



HUMAN
RIGHTS
WATCH

RUBBER STAMP JUSTICE

US Courts, Debt Buying Corporations, and the Poor



Rubber Stamp Justice

US Courts, Debt Buying Corporations, and the Poor

Copyright © 2016 Human Rights Watch

All rights reserved.

Printed in the United States of America

ISBN:

Cover design by Rafael Jimenez

Human Rights Watch defends the rights of people worldwide. We scrupulously investigate abuses, expose the facts widely, and pressure those with power to respect rights and secure justice. Human Rights Watch is an independent, international organization that works as part of a vibrant movement to uphold human dignity and advance the cause of human rights for all.

Human Rights Watch is an international organization with staff in more than 40 countries, and offices in Amsterdam, Beirut, Berlin, Brussels, Chicago, Geneva, Goma, Johannesburg, London, Los Angeles, Moscow, Nairobi, New York, Paris, San Francisco, Sydney, Tokyo, Toronto, Tunis, Washington DC, and Zurich.

For more information, please visit our website: <http://www.hrw.org>



JANUARY 2016

ISBN 978-1-6231-33184

Rubber Stamp Justice

US Courts, Debt Buying Corporations, and the Poor

Summary	1
Methodology.....	8
Background: The United States’ Debt Buying Industry	10
Flooding the Courts	13
Debt Buyer Lawsuits and Poverty.....	20
Runaway Interest and Costs.....	24
Allegations of Error and Abuse in Debt Buyer Litigation	28
Rubber Stamp Justice: Default Judgments without Evidence or Scrutiny	32
The Default Judgment Problem	33
Where are the Defendants?.....	33
Confusion and Misinformation.....	34
Concerns about Notice	36
Rubber Stamp Justice: The Absence of Judicial Scrutiny.....	38
Questionable Records and the Problem of Warranty.....	40
Allegations of “Robo-Signing”	45
Sky-High Interest and Questionable Math.....	48
Corporate Plaintiffs in the “People’s Court”	50
Thrown to the Wolves: Unrepresented Defendants in Court.....	53
Pushing Defendants into Coercive and Unequal “Negotiations”	54
“Judgeless Courtrooms”	57
Their Day in Court: Representational Inequality and “Cattle Calls”	60
The Importance of Legal Representation and Advice.....	62
Recommendations for Governments, Courts, and Debt Buyers	64
No More Rubber Stamp Default Judgments.....	64
Protect Defendants from Coercive “Negotiations” with Debt Buyer Attorneys.....	67
Level the Playing Field with Free Legal Assistance	67

Sharply Limit Interest Rates in Debt Buyer Cases	69
The Human Rights Responsibilities of Courts, State Governments, and Debt Buyers	71
Consumer Protections under US Federal Law	73
Court Integrity and the Rights of Disadvantaged Litigants	74
The Human Rights Responsibilities of Debt Buying Firms	75
Recommendations.....	77
To State Governments.....	77
To All State Court Systems	77
To Individual Courts Adjudicating Debt Buyer Cases	78
To the US Federal Government	78
To Debt Buying Companies	79
To DBA International.....	79
To Banks and other Creditors	79
Acknowledgments.....	80

Summary

Every year, several hundred thousand people across the United States are sued by companies they have never done business with and may never have heard of. These firms are called debt buyers and although they have never loaned anyone a penny, millions of Americans owe them money. Debt buyers purchase vast portfolios of bad debts—mostly delinquent credit cards—from lenders who have written them off as a loss. They pay just pennies on the dollar but can go after alleged debtors for the full face value of every debt plus interest at rates that routinely exceed 25 percent.

Debt buyers also rely on tax-funded state institutions—namely the court system—to secure much of their income. Leading debt buyers rank among the heaviest individual users of state court systems across the US, and various legal actions and research, including that of Human Rights Watch, have identified repeated patterns of error and lack of legal compliance in their lawsuits. These problems are often discovered long after the debt buyers have already won court judgments against alleged debtors, a situation that arises because of the inability of alleged debtors to mount an effective defense even when they are on the right side of the law. Debt buyer lawsuits typically play out before the courts with a stark inequality of arms, pitting unrepresented defendants against seasoned collections attorneys.

The amount at issue in any one debt buyer lawsuit rarely exceeds a few thousand dollars, but the stakes are often higher than they seem. Many of the defendants in these cases are poor or living at the margins of poverty and this is often the reason they fell into debt in the first place. For them, the impact of an adverse judgment can be devastating. Human Rights Watch interviewed alleged debtors in court who broke down in tears while trying to explain how the judgments debt buyers had won against them would impact their ability to pay bills and support their children.

None of this means that debt buyers and other creditors should not be able to enforce their claims in court, but it does mean that courts have clear and compelling reasons to handle debt buyer litigation with a particular degree of vigilance. This report describes how many courts do exactly the opposite, treating debt buyer lawsuits with passive credulity so that their imprimatur is reduced to little more than a rubber stamp. And in addition to

smoothing the way for the corporate plaintiffs, many courts have erected formidable obstacles for unrepresented defendants who simply want to have their day in court. These courts risk complicity in damaging the rights of poor people entitled to fair administration of justice and equitable proceedings, and are putting their own integrity at risk.

The scale of the debt buying industry is hard to overstate. Leading firm Encore Capital claims that one in every five US consumers either owes it money or has owed it money in the past. While a relative handful of large firms dominate the business, there are hundreds and perhaps thousands of companies buying up delinquent debts across the US at any given point in time.

Leading debt buyers collect about half of their revenue by suing alleged debtors in court. Encore and one of its leading competitors, Portfolio Recovery Associates, collected a combined total of more than \$1 billion through hundreds of thousands of lawsuits in 2014. In New York State, Encore filed more lawsuits than any other civil plaintiff that year, with Portfolio coming in third. Eight of New York's 20 most litigious plaintiffs were debt buyers in 2014, and they accounted for 47 percent of the 142,506 cases filed by that group.

Many debt buyer lawsuits rest on a foundation of highly questionable information and evidence. Debt buyers do not always receive meaningful evidence in support of their claims when they purchase a debt, and in some cases the sellers explicitly refuse to warrant that any of the information they passed on is accurate or even that the debts are legally enforceable. Enormous accumulations of interest—often in excess of 25 percent compounded over periods of several years—are added to many alleged debts based entirely on the debt buyers' own calculations. The lawsuits themselves are then often generated largely by automated process without meaningful scrutiny by any human.

The predictable result of all this is that debt buyer lawsuits are sometimes riddled with fundamental errors. Debt buyers have sued the wrong people, sued debtors for the wrong amounts, or sued to collect debts that had already been paid. In other cases they have filed lawsuits that were barred by the applicable statutes of limitations or were otherwise legally deficient. There have been multiple allegations, some which have led to successful legal cases, that some debt buyer attorneys fail to serve defendants notice of the suits against them in order to obtain large volumes of uncontested judgments. While industry

representatives and their critics differ over the prevalence of these problems, their existence is not in serious dispute. Leading debt buyers have settled numerous lawsuits and enforcement actions alleging errors and legal flaws, and the settlement agreements have forced them to throw out tens of thousands of unfounded judgments they had won against consumers.

The debt buying industry has attracted a significant degree of media and regulatory scrutiny in recent years. It has also aroused the very public ire of some law enforcement and regulatory officials. New York's attorney general has publicly condemned debt buyers who "abuse" the power of the courts at the expense of "hardworking families." These are stirring words, but the problem with statements like these is that they cast the courts as a second set of victims when in reality they bear direct responsibility for allowing abuses to take root and proliferate.

When debt buyer lawsuits result in unjust and financially disastrous outcomes for poor families, the courts' own failures and shortcomings are often directly responsible. Fundamental problems with debt buyer lawsuits often come to light only after the companies have already won judgments they were never entitled to, in courts that never asked them to present any meaningful evidence in support of their claims.

This report describes the many ways courts across the US fail to stand up for the rights of disadvantaged defendants in debt buyer lawsuits, or put those defendants' sophisticated corporate adversaries to their burden of proof. It also describes the devastating impact these failures can have on families who are struggling at the margins of poverty. While new regulatory efforts at the federal level offer some hope of better policing the industry, the federal government can do little to address the shortcomings of state court systems. The rights of defendants will remain under threat until they reform their practices as well.

In the large majority of consumer credit lawsuits—including debt buyer cases—alleged debtors fail to mount a defense to the case against them, sometimes because they never receive proper notice of the suit. Many courts routinely award default judgments to debt buyers in these cases without scrutinizing the claims at issue. One Arizona justice of the peace aptly described this to Human Rights Watch as a "greased rail" process. Many individual courts issue thousands or even tens of thousands of no questions asked default judgments in favor of debt buyers every year. Some judges routinely enter hundreds of

default judgments for debt buyers in the space of just a few hours. One judge told Human Rights Watch that he does this at home while relaxing on a Sunday afternoon.

When defendants do attempt to defend themselves in court, they are badly outclassed by their opponents. The plaintiffs are often large corporations represented by top-tier collections attorneys. By contrast, hardly any of the defendants in debt buyer lawsuits have legal representation and many are largely unaware of their rights. Rather than try to mitigate this imbalance, many courts greatly exacerbate it.

When defendants appear alone in court they sometimes confront a gauntlet of obstacles to overcome in order to secure a hearing in front of a judge. Many courts—sometimes under political pressure to clear their dockets quickly rather than carefully—push defendants into unsupervised “discussions” with debt buyer attorneys in hopes that the parties will settle and obviate the need for a trial. In many cases this is precisely what happens, but often it is because these encounters can and do take on a coercive or deceptive character. Many defendants come to court intending to fight the case against them but end up capitulating in the courthouse hallways. Some are persuaded that they have no choice.

This report describes instances where debt buyer attorneys pulled defendants out of court at the encouragement of judges, and then berated or misled them into foregoing a hearing and agreeing to pay the debt buyer everything it had asked for. Often defendants wrongly assume that their adversary’s attorney is giving them unbiased legal advice when they tell them that they will be worse off if they insist on a hearing. Many defendants fail to appreciate that the burden is on the plaintiffs to prove their case, and are easily persuaded that they cannot prevail because they do not possess evidence that disproves the claims against them. Some judges seem only too ready to accept defendants’ sudden capitulation without asking questions about how it was obtained.

Courts in several states have done far worse, creating “judgeless courtrooms” where alleged debtors are summoned to court for the sole purpose of forcing them to participate in unsupervised discussions with debt buyer and other creditor attorneys. In theory, these are resolution conferences that give both parties the opportunity to explore possibilities for compromise. In reality, such proceedings are nothing more than a crudely disguised opportunity for creditor attorneys to pressure defendants into giving up their right to a

hearing. Some courts—like the municipal court in Philadelphia—actually allow creditor attorneys to run these proceedings themselves, calling defendants one by one into hallways or back rooms where the large majority is persuaded to give up without ever going in front of a judge. This allows plaintiffs to commandeer the coercive machinery of the courts in service of their own claims to the detriment of defendants’ due process rights and the courts’ own neutrality and integrity.

Even when defendants do manage to have their day in court, they often struggle to articulate whatever legally viable defenses they might have available. Some judges recognize the importance of ensuring fairness in the proceedings they preside over, helping to guide pro se litigants through a hearing and taking proactive steps to confirm that a debt buyer’s case has some indication of merit. Others, bound by overly rigid interpretations of judicial neutrality, refuse to push corporate plaintiffs to meet their burden of proof if the defendant lacks the legal sophistication to do it on their own. The result is that many alleged debtors who may have viable defenses to the cases against them never have a real opportunity to articulate them, simply because they don’t know how.

Some judges do a better job of navigating these problems than others, but there are limits to what individual judges can achieve in the context of unhelpful legal frameworks and court rules. In Michigan, a state district court attempted to subject debt buyers’ requests to garnish the wages of debtors to meaningful scrutiny and rejected numerous garnishment requests due to thousands of dollars’ worth of errors, along with evidence that some of the garnishments related to debts that were invalid or which had already been paid. Debt buyer Credit Acceptance Corporation sued the court arguing that under court rules its clerks had no right to demand supporting documentation in support of the garnishment requests. The state Supreme Court ruled in favor of the debt buyer, affirming that there was no basis in the rules of the district court for doing so. The district court now processes debt buyer garnishment requests quickly and with little or no substantive scrutiny.

This report makes concrete recommendations to courts and to state and federal policymakers which, if implemented, would help safeguard the rights of alleged debtors sued by debt buying companies and protect the integrity of the courts at the same time.

Courts should not issue default judgments to debt buyers unless credible evidence is submitted in support of a claim. A few states—notably New York—have adopted rules to this effect. They should serve as a model for the many states that have so far done nothing.

Just as important, courts should take steps to help unrepresented litigants secure a meaningful day in court regardless of whether they can afford to hire an attorney. As an obvious first step, courts and legislatures should ban rather than encourage the “hallway conferences” and “judgeless courtrooms” some debt buyer attorneys use to deceive and pressure defendants into giving up their right to a court hearing. Courts and state legislatures should also support programs to provide widespread access to pro bono legal advice. Experience has shown that this approach can greatly improve unrepresented defendants’ ability to defend themselves in court. Many of these recommendations would also serve to promote justice in other kinds of debt collection lawsuits filed by other creditors.

In many states, the courts themselves are also badly in need of further assistance and capacity. Too often, elected officials demand that courts clear unmanageably large dockets with impossible speed while at the same time failing to allocate the resources courts need to do that job honestly and fairly.

Although officials with some leading debt buying firms told Human Rights Watch said that they viewed reforms pursued in some state legislatures as unfair and prejudicial against the industry, they also indicated that they would not oppose many of the reforms suggested in this report. To the extent that this is true, it makes the failure of many states and court systems to act even more inexcusable—particularly given how many state law enforcement officials have publicly denounced the litigation practices of debt buyers.

Human Rights Watch takes no position on the policy arguments for or against the sale and purchase of delinquent consumer debt, but we believe Congress should pass legislation that sharply limits the rate at which interest can continue to accumulate on a debt after it is sold on to a third party. Federal law can and should recognize that debt buyers are not in the same position as original creditors—they are seeking to appreciate an investment in bad debt, not to recoup money they have lent under agreed-upon contractual terms. There is no compelling rationale for allowing debt buyers to accumulate interest at credit card

rates after they purchase a debt. On the other hand, the fact that current law allows debt buyers to do just that places a huge, unfair burden on alleged debtors and is often the reason poor families struggle to pay these debts down over time. This can come at the expense of alleged debtors' ability to secure basic economic and social needs such as food, clothing, and medicine. States, for their part, should revisit statutory rates of post-judgment interest that can also be punitively high.

Methodology

This report is based largely on more than 100 interviews with a broad range of litigants, public officials, independent experts, and other stakeholders in a dozen US states, with diverse perspectives on debt buyer litigation. These include judges, clerks, and other court personnel; plaintiff and defense attorneys; consumer rights advocates; debt buyer industry representatives; federal policymakers; academic experts; and people who have been sued by debt buyers. We also observed court proceedings related to debt buyer lawsuits in more than two dozen courts in five states: Michigan, Arizona, Maryland, New York, and Pennsylvania. In several courts, Human Rights Watch obtained transcripts and other materials related to cases that are particularly striking examples of the broader problems described below.

In May 2015, Human Rights Watch met in Washington, DC with representatives of Debt Buyers Association International (DBA International), the leading industry association of US debt buyers. We maintained ongoing correspondence with DBA officials throughout the process of producing this report to seek their input on a range of issues. Human Rights Watch also conducted two telephone interviews with the general counsel and executive vice president for US operations of Encore Capital, the nation's largest debt buyer.

Practices in the five states where we carried out field research were examined in varying depth and for different reasons. Michigan and Arizona are highlighted in the report because they are representative examples of states whose court systems and legislatures have been particularly inactive in tackling the problems described in this report. New York was examined primarily as an example of a state that has been unusually proactive in taking steps to tackle the issues. Maryland and Pennsylvania were looked at more narrowly as states where some local courts were reputed to have developed particularly egregious “rocket docket” or “judgeless courtroom” proceedings that trample on the rights of defendants to an extreme degree.

This report also draws heavily on a broad range of external resources, including academic literature, investigative journalism, industry publications, court filings by debt buyers, and materials related to various civil lawsuits and regulatory actions against debt buyers at the

state and federal levels. We also sought to obtain empirical data from several courts and state court systems with varying degrees of success. In response to detailed requests by Human Rights Watch, the New York state court system provided detailed information about the huge numbers of cases filed by debt buyers relative to other civil plaintiffs. The New York courts also provided us upon request with the data necessary to create a randomized sample of 500 debt buyer lawsuits drawn from cases filed in courts across the state in 2014. This was a true random sample drawn from a list of every case filed across all New York courts in 2014 by the eight most prolific debt buyer plaintiffs that year. We used that sample to draw out information about the prevalence of default judgments and the frequency with which defendants secure legal representation. The justice courts in Maricopa County, Arizona provided similarly detailed information about the number of cases filed by particular debt buyers and the results of those cases.

In several Michigan and Arizona courts, court officials told Human Rights Watch that they could not or would not produce similar information from their own records. Detroit's 36th district court failed to respond in any way to repeated requests for basic information about the court's civil docket, even when some requests were delivered in person to court administrators and framed in ways that court personnel informally told Human Rights Watch would be easy to fulfill.

Background: The United States' Debt Buying Industry

Millions of people across the United States are in debt to companies they have never done business with and may never have heard of. These firms are called debt buyers. They purchase bad debts from lenders who have given up on trying to collect them and go after the debtors on their own behalf. Together they make up one of the biggest industries most Americans have never heard of.

At any given point in time, hundreds of billions of dollars' worth of US household debt is in some stage of delinquency.¹ When a borrower goes long enough without making a payment, federal regulations require banks to “charge off” the debts, meaning that they no longer count as assets on their balance sheets. Charged-off debts do not simply disappear—creditors still own them and debtors still owe them.² But creditors often conclude that it is no longer worth the effort and expense of continuing to try to collect these debts. Rather than accept a total loss, creditors roll many of them into large portfolios that they sell on to debt buyers.

The debt buying industry has grown enormously during the past two decades.³ In fact, the buying and selling of delinquent consumer debt has become so routine that tens of

¹ As of March 2015, 5.7 percent of all US household debt was in some stage of delinquency. Those delinquent debts were worth some \$679 billion, of which \$501 billion was “seriously derogatory,” meaning that the borrowers were more than 90 days late making a payment. Federal Reserve Bank of New York, “Quarterly Report on Household Debt and Credit,” May 2015, http://www.newyorkfed.org/householdcredit/2015-q1/data/pdf/HHDC_2015Q1.pdf (accessed October 9, 2015).

² Federal regulations require lenders to “charge off” debts that are delinquent beyond a specified number of days. This is essentially an accounting exercise. Creditors are free to continue to try and collect “charged-off” debts but cannot treat them as assets for the purpose of satisfying capital requirements. See Federal Deposit Insurance Corporation (FDIC), “Uniform Retail Credit Classification and Account Management Policy,” April 20, 2014, <https://www.fdic.gov/regulations/laws/rules/5000-1000.html> (accessed October 9, 2015). In recent years, banks have charged off between 2 and 6 percent of all consumer loans. Board of Governors of the Federal Reserve System, “Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks,” August 18, 2015, <http://www.federalreserve.gov/releases/chargeoff/chgallsa.htm> (accessed October 9, 2015).

³ According to the US Federal Trade Commission, “the most significant change in the debt collection business in recent years has been the advent and growth of debt buying.” Federal Trade Commission (FTC), “Collecting Consumer Debts: The Challenges of Change: A Workshop Report,” 2009, <http://www.ftc.gov/bcp/workshops/debtcollection/dcw.pdf> (accessed October 9, 2015), p. 13.

millions of people across the US either owe money to a debt buyer or have in the past. Most of the debts sold on to debt buyers in any given year are credit card debts.⁴ Industry leader Encore Capital, a firm better known to millions of alleged debtors as Midland Funding, is one of a handful of large firms that dominates the market for purchased debt, which is also home to a proliferation of much smaller players.⁵ Encore's balance sheets are more transparent than many of its competitors' because it is a publicly traded company, and they help illustrate the scale and reach of the debt buying industry. In 2013 and 2014 alone, Encore purchased more than 35 million charged-off consumer accounts with a total face value of nearly \$100 billion, and in an average year it successfully collects more than \$1 billion from US consumers.⁶ The company, which has never actually loaned anyone a penny, claims that one in every five US consumers either owe it money or have owed it money in the past.⁷

The debt buying industry's business model is rooted in a very simple logic. If debt buyers can acquire debts cheaply enough, and develop efficient, low-cost methods of pursuing debtors, they can realize substantial profits by collecting even a small percentage of the debts they purchase. The prices are certainly low enough. A 2013 Federal Trade Commission study found that during one three-year period, nine of the country's largest debt buyers paid just \$6.5 billion for 90 million accounts with a face value of \$143 billion—an average price of just 4.5 cents on the dollar.⁸ Leading debt buyers have also managed to keep their collection costs low relative to returns. In 2013, Encore Capital spent just 40.5 cents on US collection efforts for every dollar it managed to pull in.⁹

⁴ In 2008, debt buyers purchased \$55.02 billion worth of consumer debt, of which \$43.49 billion was credit card debt purchased directly from the issuers. FTC, "Structure and Practices of the Debt Buying Industry," January 2013, <https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf> (accessed October 26, 2015), T-1, citing "The Nilson Report, Credit Card Debt Sales in 2008," March 2009.

⁵ Encore is the parent company of Midland Funding. Other large firms include Sherman Financial Group, which is the parent company of LVNV and Resurgent Capital, CACH, and Portfolio Recovery Associates.

⁶ Encore Capital Group, Form 10-K, 2015, <http://investors.encorecapital.com/phoenix.zhtml?c=115920&p=irol-sec> (accessed October 9, 2015), p. 62.

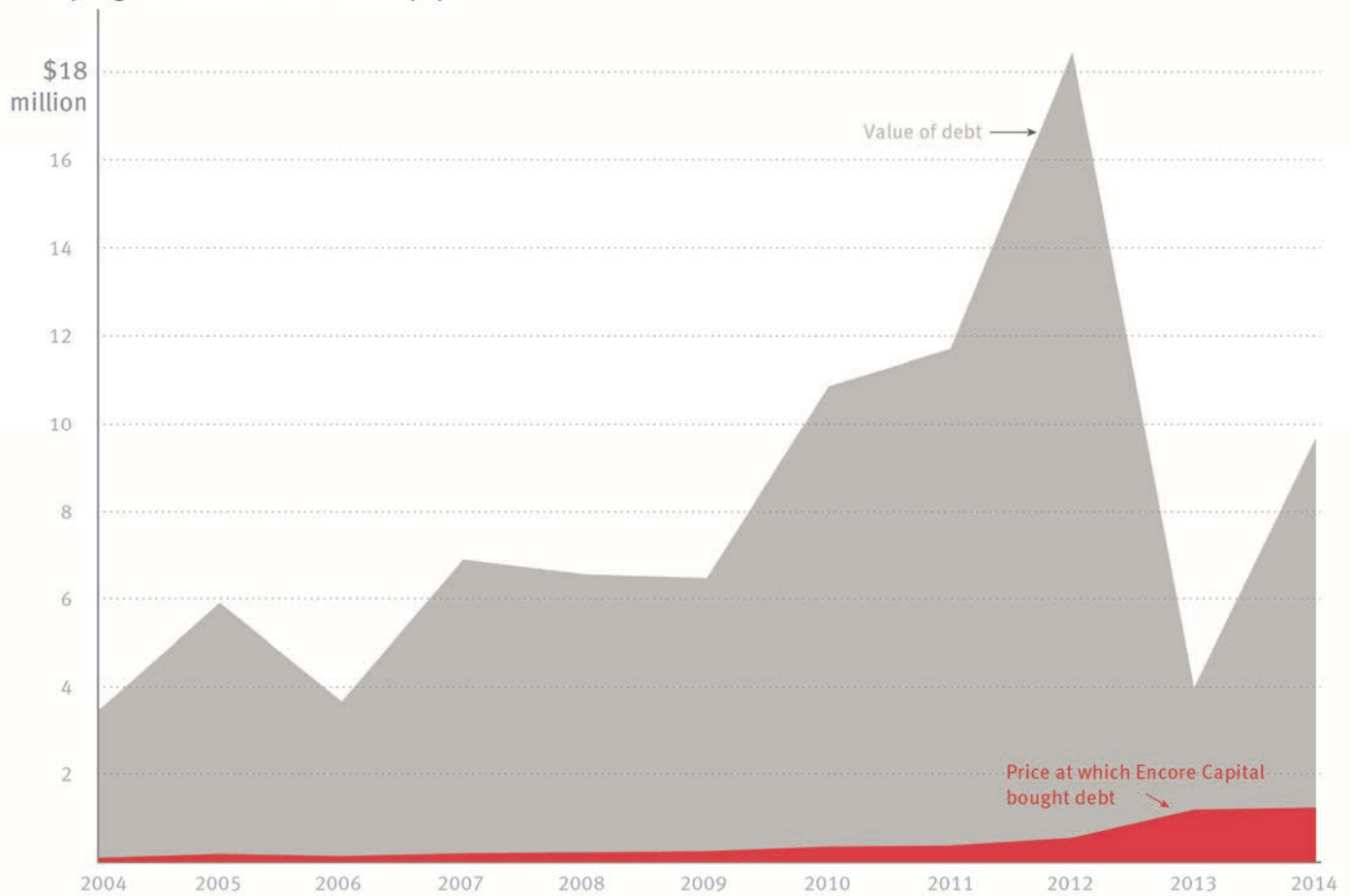
⁷ Human Rights Watch telephone interview with Greg Call, general counsel, Encore Capital and Ashish Masih, executive vice president, US Operations, Encore Capital, June 15, 2015. See also William Blair, "William Blair & Company's Growth Stock Conference, Presentation: Encore Capital Group, Inc.," June 2014.

⁸ FTC, "Structure and Practices of the Debt Buying Industry," pp. 22-24.

⁹ The company spent nearly \$464 million on collection efforts that brought in \$1.145 billion. Encore Capital Group, Form 10-K, 2015, p. 52.

Encore Capital Group Inc.

Buying consumer debt cheaply.



Source: Encore Capital Group Inc. Annual Reports.

The debt buying industry and its proponents claim that a thriving market in delinquent debts actually benefits consumers. Debt buyers allow original creditors to recoup some of what they lose when a loan goes bad, and in theory this leads them to extend credit more widely and at more favorable terms than would otherwise be the case.¹⁰ There does not appear to be any solid empirical evidence in support of this claim, however.¹¹

¹⁰ See Dalie Jimenez, "Dirty Debts Sold Dirt Cheap," *Harvard Journal on Legislation*, vol. 52 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250784 (accessed October 9, 2015), p. 3: "the existence of this secondary market for consumer debts lowers the overall cost of credit and, some argue, is critical to our credit economy."

¹¹ For a broad overview of arguments in support of the assertion that overly restrictive regulation of debt collection and debt buying would reduce low-income borrowers' access to credit and force them to confront higher rates of interest, see Todd J.

Flooding the Courts

Debt buyers can try to collect the debts they purchase in the same way any other creditor would. Some make considerable attempts to locate and contact alleged debtors by phone or mail, or hire third party collection agencies to do this work on their behalf. In general, though, the debt buying industry is heavily reliant on litigation as a collections strategy. A key element of the industry's overall business model is the large-scale procurement of court judgments against debtors at minimal expense.¹²

Every year, each of the nation's biggest debt buyers file hundreds of thousands of new lawsuits in courts across the US against people who allegedly owe them money.¹³ Encore Capital alone has often filed between 245,000 and 470,000 new lawsuits against consumers in a single year.¹⁴ In fact, debt buyers appear to rank among the heaviest individual users of the nation's court system.¹⁵ In New York State—which has actually experienced a notable decline in debt buyer lawsuits in recent years—data provided to Human Rights Watch by the state court system reveals that the state's 20 most litigious plaintiffs filed 142,506 cases in 2014, out of which 67,031—47 percent—were brought by

Zywicki, "The Law and Economics of Consumer Debt Collection and its Regulation," *George Mason Legal Studies Research Paper*, No. LS 15-17 (2015), <http://www.dbainternational.org/wp-content/uploads/2015/09/TheLawAndEconomicsofConsumerDebtAndItsRegulation.pdf> (accessed October 26, 2015). The article is rooted in a law and economics analysis. It does not reference empirical data in support of its assertions about the debt buying industry.

¹² One leading industry critic has gone further, arguing that "[l]awsuits filed by junk debt buyers expose a business model that is, literally, the buying and selling of claims to be utilized in litigation for profit." Peter Holland, "Junk Justice: A Statistical Study of 4,400 Lawsuits Filed by Debt Buyers," *Loyola Consumer Law Review*, vol. 26, no. 1 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406289 (accessed October 9, 2015), p. 183.

¹³ Nationwide data on the number of lawsuits filed by debt buyers each year does not exist. DBA International, the leading industry association of US debt buyers, told Human Rights Watch that it does not have any estimate of the total number of lawsuits filed by its member companies. Letter from DBA International to Human Rights Watch, "Draft Responses to Questions by Human Rights Watch," April 17, 2015, (hereinafter "DBA Letter"), on file with Human Rights Watch. In Maryland, a group of 22 debt buyers filed 168,462 cases from 2009-2013, though some of those companies went out of business or were acquired by competitors along the way. Peter Holland, "Junk Justice Update: Maryland Debt Buyer Filings in 2012-2013," September 24, 2015, <http://www.hollandlawfirm.com/debt-buyers/junk-justice-update-maryland-debt-buyer-filings-in-2012-2013/> (accessed October 26, 2015).

¹⁴ Jessica Silver-Greenberg, "Boom in Debt Buying Fuels another Boom—in Lawsuits," *Wall Street Journal*, November 28, 2010, <http://www.wsj.com/articles/SB10001424052702304510704575562212919179410> (accessed October 9, 2015). In 2008, at the height of the US economic crisis, Midland filed 474,000 cases. Peter Holland, "Junk Justice Update: Maryland Debt Buyer Filings in 2012-2013." Encore declined to provide Human Rights Watch with updated figures on the number of lawsuits it has filed in more recent years. Human Rights Watch telephone interview with Greg Call and Ashish Masih, June 15, 2015.

¹⁵ For a broader critique arguing that an overly litigious collection industry has "swamped small claims and other state courts with a torrent of lawsuits," see Rick Jurgens and Robert J. Hobbs, "The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms the Courts," National Consumer Law Center, 2010, <http://www.nclc.org/images/pdf/pr-reports/debt-machine.pdf> (accessed August 1, 2015).

debt buyers. In addition, four of the ten most prolific plaintiffs in that state were debt buyers. By contrast only two original creditors—Discover Bank and Capital One—made the list.¹⁶ Similarly, a 2015 study by nonprofit news organization *ProPublica* found that collectively, debt buyers filed more lawsuits than any other kind of plaintiff in Newark, St Louis, and Chicago.¹⁷

On a more local level, debt buyers make up one of the single biggest components of the entire civil docket in many low-level courts.¹⁸ According to data provided to Human Rights Watch by the justice courts of Arizona’s populous Maricopa County (which includes the city of Phoenix), 5 large debt buyers filed more than 21,000 new lawsuits in those courts during a 12-month period beginning in July 2013. This constituted more than 15 percent of all civil case filings.¹⁹ Where numbers are not available, anecdotal evidence paints a similar picture. A court clerk in one busy Michigan district court described debt buyer attorneys bringing in new case filings and wage garnishment requests “by the box load.”²⁰ New York State Chief Judge Jonathan Lippman told Human Rights Watch that in many states there is “a mill of these cases plowing through the system.”²¹

¹⁶ Data on file with Human Rights Watch.

¹⁷ Paul Kiel and Annie Waldman, “The Color of Debt: How Collection Suits Squeeze Black Neighborhoods,” *ProPublica*, October 8, 2015, https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods?utm_campaign=sprout&utm_medium=social&utm_source=twitter&utm_content=1444305817 (accessed October 9, 2015).

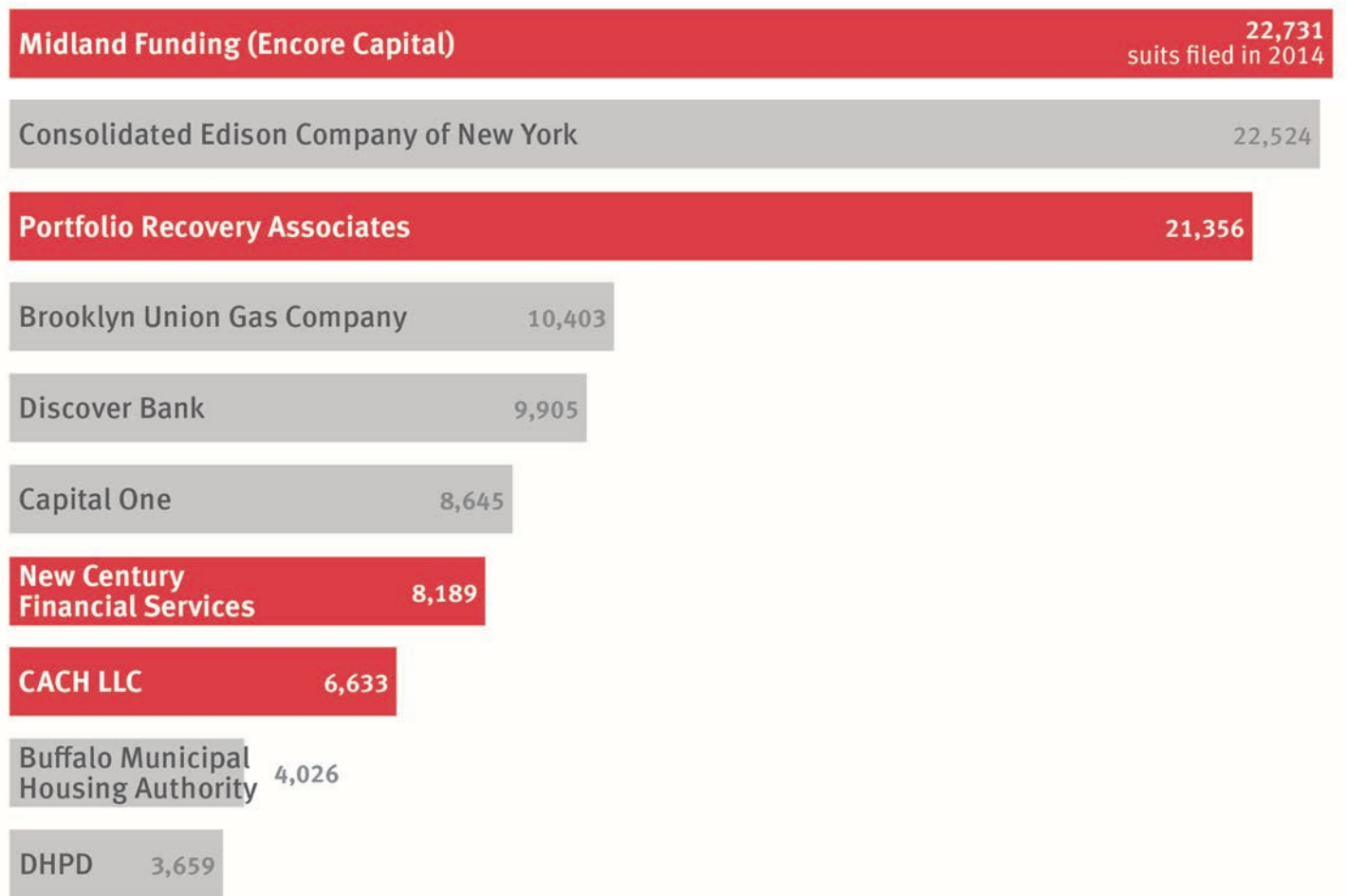
¹⁸ Many local court systems either do not maintain online case databases of any kind, or have online case search functions that are antiquated and unable to process the sheer volume of results returned when searching for cases filed by any one leading debt buyer over even a relatively small period of time. Owing largely to the relatively small monetary amounts at issue in any one case, most debt buyer and other debt collection lawsuits are heard not in federal court, but at the lower levels of state-run court systems or in courts administered and overseen by county or municipal governments. The quality of these courts—and the resources available to them—can vary widely from one locality to another.

¹⁹ The companies were Asset Acceptance, LVNV, Midland Funding/Encore, Portfolio Recovery Associates, and Unifund. The total number of cases filed by these five companies was 22,211. Data on file with Human Rights Watch. The largest component of the court’s civil docket consists of evictions cases brought by landlords, of which there were 65,000 in FY 2014. *Ibid.*

²⁰ Human Rights Watch interview with Michigan district court clerk (name withheld), Michigan, April 15, 2014.

²¹ Human Rights Watch interview with Jonathan Lippman, chief judge of the state of New York, New York City, November 14, 2014.

Four of the ten most prolific plaintiffs in New York State were debt buyers in 2014. ■ Debt buyer



Some firms, like Portfolio Recovery Associates, try to channel much of their litigation through in-house legal departments.²² Most, however, farm most of their litigation out to sprawling networks of collections law firms across the US. Debt buyers generally pay these firms on contingency—typically one-third of any amount ultimately recovered from the defendants.²³

²² PRA Group, Form 10-K, March 2015, <http://ir.pracgroup.com/secfiling.cfm?filingID=1185348-15-8&CIK=1185348> (accessed October 9, 2015); Human Rights Watch interview with PRA Attorney (name withheld), Maricopa County, AZ, July 2014.

²³ Human Rights Watch interview with Jan Stieger, executive director, DBA International; Brian Faliero, director, Sherman Financial Group; Daniel Picciano III, division president, Resurgent Capital Services; Kelly Knepper-Stephens, general counsel, Stoneleigh Recovery Associates; and Brian Fair, president, Fair Resolutions, Inc., Washington, DC, April 29, 2015 (hereinafter “DBA Interview”). Encore Capital Group, Form 10-K, 2015.

DBA International emphasized to Human Rights Watch that many debt buyers “would rather not litigate accounts; most would rather resolve the accounts voluntarily with the consumer.”²⁴ Be that as it may, large scale debt buyers are heavily reliant on the courts to secure financial returns on their investments. Encore Capital, which publicly describes legal action against debtors as a “last resort,” earned \$610 million through lawsuits against consumers in 2014—more than half of its total collections.²⁵ Similarly, Portfolio Recovery Associates earned \$371 million through legal collections in 2014, half of the \$742 million the company collected from consumers that year.²⁶ In 2014, these two companies alone earned nearly \$1 billion by suing alleged debtors in courts across the US.

Available data seems to indicate that for top-tier debt buyers, suing consumers is a reliably profitable endeavor. The quarterly filings of publicly traded firms Encore Capital and Portfolio Recovery Associates indicate that the cost of legal collections hovers at around one third the amount of collections.²⁷ In 2014, Encore spent \$205 million on legal collection efforts that earned it \$610 million, while Portfolio spent \$139 million on lawsuits that yielded a total return of \$371 million.²⁸ These figures represent approximately a 297 percent and 267 percent rate of return on debt litigation, respectively.

²⁴ DBA Letter, April 17, 2015.

²⁵ Encore Capital Group, Form 10-K, 2015, p. 36. In the first quarter of 2015 Encore earned nearly \$159 million through legal collections, up slightly from the previous year. Encore Capital Group, Form Q1 10-Q, 2015, <http://investors.encorecapital.com/phoenix.zhtml?c=115920&p=irol-sec> (accessed January 12, 2016), p. 36

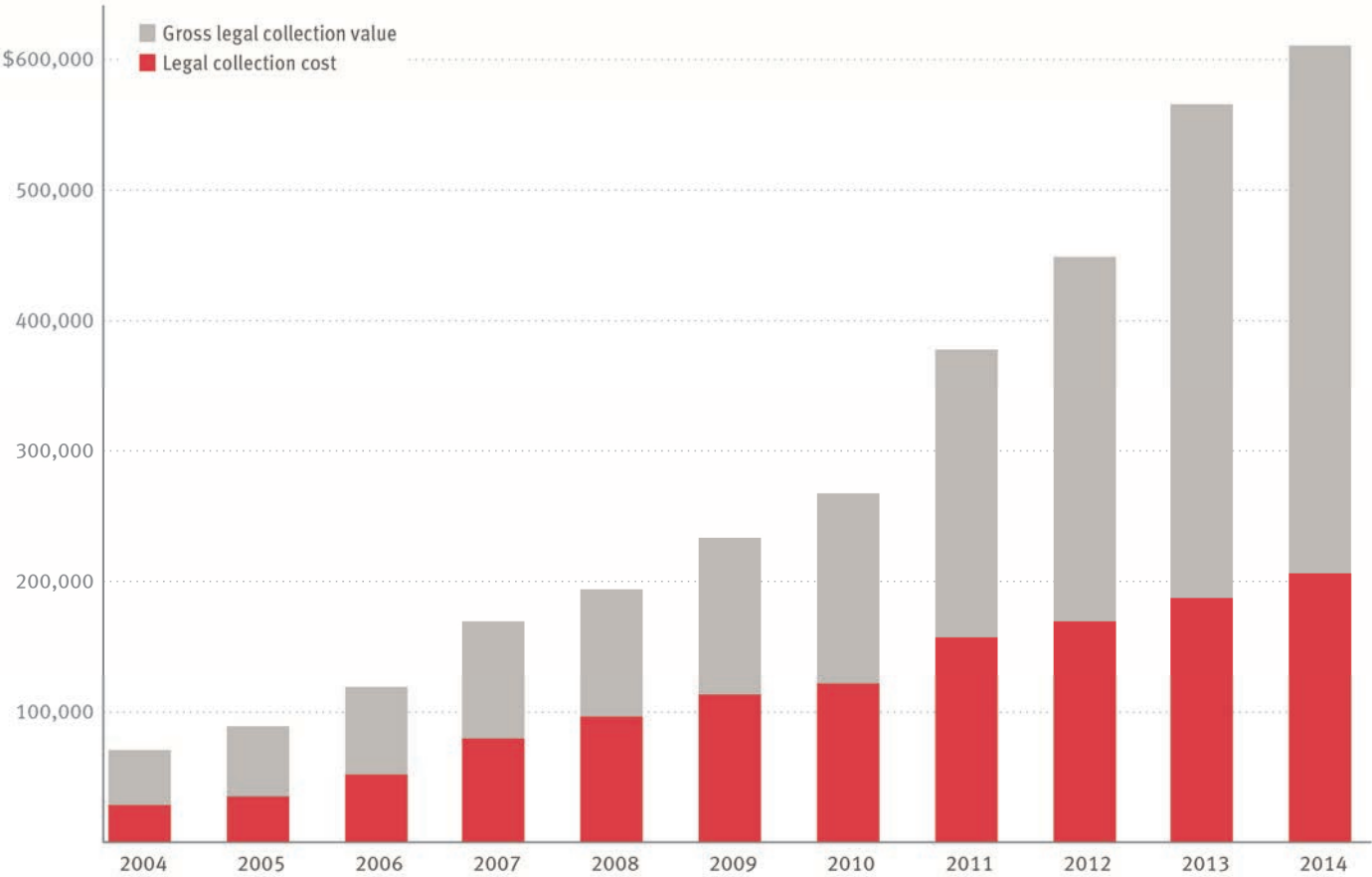
²⁶ PRA Group, Form 10-K, March 2015.

²⁷ This is largely explained by the fact that many debt buyers pay their lawyers contingency fees pegged at around one third the amount of any collections. Debt buyers do point out that “the ratio of legal costs to legal collections does not consider, (a), what you paid for the debt in the first place and, (b), the opportunity cost of not having collected it another way.” DBA Interview, April 29, 2015.

²⁸ The figures are similar in other years. In 2012 and 2013, Encore’s legal collections costs were \$168 million and \$187 million, respectively, with returns of \$448 million and \$565 million. Portfolio spent \$125 million on legal collections in 2013 for a return of \$285 million. Encore Capital Group, Form 10-K, 2015, p. 50; PRA Group, Form 10-K, March 2015.

Encore Capital Group Inc.

Reaping an enormous return on litigation, getting about \$3 back for every \$1 spent on lawyers and court fees.



Source: Encore Capital Group Inc. Annual Reports.

A Diverse Array of Firms

Generally speaking, debt buyers fall into one of two categories: a handful of large, sophisticated corporations that increasingly dominate the industry, and a vast proliferation of much smaller operations. To some extent each of these two camps blames the other for their industry's negative public reputation.

The debt buying industry has experienced a trend toward upheaval and consolidation in recent years, with the big players getting bigger and many smaller players being pushed out of the business entirely.²⁹ Some large debt buying firms argue that consumer advocates should welcome this trend. In this telling, larger firms have made great progress in putting in place controls that reduce the possibilities for error and abuse, while supposedly irresponsible and unsophisticated smaller firms are responsible for most of the problems that continue to pervade the industry. Encore General Counsel Greg Call told Human Rights Watch that smaller debt buyers are "much less likely to have meaningful, accurate data" in support of their claims against debtors, partly because they are often buying debt that has been sold and resold several times. "If people really want to change things," he added, "they should go after these smaller players."³⁰

Smaller debt buyers hotly reject this narrative. Rob Warner, the president of the Michigan creditor bar and also the principal of a relatively small debt buying firm, told Human Rights Watch that the industry's biggest and most publicized scandals have all implicated its biggest firms. "We have been frustrated by some of the high-profile disasters from some of the larger entities," he said. "The stuff that splashes across the front page is not coming from a small debt buyer."³¹ Brian Fair, head of a small Washington State debt buyer called Fair Resolutions and a director on the Board of DBA International, has argued that it is naïve to cheer the consolidation of power sweeping the industry. "Fewer companies operating in an industry injects the heightened risk of collusion," he wrote in an op-ed for *The Hill*, a publication largely geared towards Washington policymakers. "Can you imagine what could happen if only a handful of companies own all the

²⁹ DBA Interview, April 29, 2015; Human Rights Watch telephone interview with Greg Call and Ashish Masih, June 11, 2015. In 2008, nine large debt buyers purchased 76.1 percent of all debt sold that year. As of 2015, several of those firms are no longer in existence or have been acquired by other debt buying companies. FTC, "Structure and Practices of the Debt Buying Industry," p. 14. See also Peter Holland, "Junk Justice Update: Maryland Debt Buyer Filings in 2012-2013," noting that: "The most notable feature in Maryland is industry consolidation. In ... 2010, no debt buyer had more than 25 % of the cases filed and there were several small but substantial players. In 2013, 67 % of these cases were filed by just two debt buyers: Midland Funding (40 %) and Portfolio Recovery Associates (27 %)."

³⁰ Human Rights Watch telephone interview with Greg Call and Ashish Masih, June 11, 2015. Similarly, in its landmark 2013 study, the FTC noted that, "The Commission's experience suggests that these types of debt buyers are likely to be a source of significant consumer protection problems." FTC, "Structure and Practices of the Debt Buying Industry," p. 8. In 2014, reporter Jake Halperin authored a particularly vivid look at the world of a small-time debt buyer in Buffalo. Jake Halperin, *Bad Paper: Chasing Debt From Wall Street to the Underworld* (New York: Farrar, Straus, and Giroux, 2014).

³¹ Human Rights Watch telephone interview with Rob Warner, president, Michigan Creditors Bar Association; Jan Stieger; and Brian Fair, June 12, 2015.

non-performing debt in the industry? Our most vulnerable consumers do not need to face this additional risk.”³²

³² Brian Fair, “Keep small business in the credit cycle,” *The Hill*, May 20, 2015, http://thehill.com/blogs/congress-blog/economy-budget/242594-keep-small-business-in-the-credit-cycle#disqus_thread (accessed October 9, 2015).

Debt Buyer Lawsuits and Poverty

Encore Capital General Counsel Greg Call told Human Rights Watch that he was perplexed as to why debt buyers seem to receive more media scrutiny than other kinds of creditors.³³ This is a legitimate perspective and it is important to acknowledge that many of the problems described in this report are rooted in larger dysfunctions with the way courts approach all manner of debt collection lawsuits. In a landmark 2010 report, the US Federal Trade Commission concluded that “[t]he system for resolving disputes about consumer debts is broken” and that “neither litigation nor arbitration currently provides adequate protection for consumers.”³⁴

Within this broader context, though, Human Rights Watch research indicates that there are unique problems with the way many courts approach debt buyer lawsuits. These problems raise human rights concerns from the perspective of fair adjudication of rights, as well as their negative impact on the security of the defendants’ basic economic and social rights such as rights to housing, food, and clothing. This makes it imperative for court systems and policymakers to urgently address these problems squarely and on their own terms. In part and as described below, this is because debt buyer litigation is resolved by the courts following a process which fails to fairly protect the interests of both parties and has been prone to large-scale patterns of error and alleged abuse that many courts have largely failed to address effectively, or in some cases even to recognize.³⁵ Simply put, courts hand down far too many judgments to debt buyers without actually knowing whether the alleged debts are real, enforceable, and correctly calculated. But what lends these broader problems’ true urgency is the simple fact that debt buyer lawsuits can and do destabilize the precarious efforts of struggling families to make ends meet and secure their basic social and economic rights.

Many of the debts owned by debt buyers were charged off and sold on to them in the first place precisely because borrowers could not afford to keep up with payments. This does

³³ Human Rights Watch telephone interview with Greg Call and Ashish Masih, June 11, 2015.

³⁴ FTC, “Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration,” July 2010, <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf> (accessed October 9, 2015), p. i.

³⁵ See below, Allegations of Error and Abuse in Debt Buyer Litigation.

not mean that debtors should not pay what they owe, but it does mean that the courts should take care to ensure that the judgments they hand down in debt buyer cases have merit. For defendants living in or at the margins of poverty, the evidentiary and due process concerns highlighted in this report take on an outsized level of importance and urgency.

In Detroit, Human Rights Watch interviewed a woman who was trying to raise two young children on her own on the \$10 an hour she earned at a local Dollar General store. Though struggling to make ends meet she was grateful for the work, coming as it did on the heels of a long period of unemployment. But after just a month on the job, a debt buyer who had already obtained a court judgment against her began garnishing 25 percent of every paycheck. She claimed she had not even been aware that a judgment had been entered against her to begin with, and that the wage garnishment had caused real and sudden hardship for her family. Speaking through tears, she told Human Rights Watch:

I don't have money for my baby's diapers. My lights and gas is off right now. My paycheck is about 300 a week and sometimes I only bring home 220. I can't afford [the garnishment] out of my check. I barely even get anything to begin with.³⁶

In the corridors of more than a dozen courthouses, Human Rights Watch spoke to many other alleged debtors in similar straits.

In an Arizona courtroom outside of Phoenix, one person who had just had a judgment entered against her for \$2,164 in a debt buyer case explained, "I'm barely making it. If they garnish my wages I couldn't even afford to buy groceries. We struggle with that as it is."³⁷

In New York, a single mother told Human Rights Watch that she had multiple default judgments entered against her by debt buyers and other creditors for a total of more than \$15,000. She said—and later proved to the satisfaction of a New York judge—that she had never received notice of the lawsuits and only learned about them after the judgments were entered. "When I saw the amount I was like, 'There is no way I am ever going to repay

³⁶ Human Rights Watch interview with defendant (name and date withheld), Detroit, MI.

³⁷ Human Rights Watch interview with defendant (name withheld), North Valley Justice Court, Surprise, AZ, July 21, 2014.

this,” she told Human Rights Watch. “I mean, I’m struggling on what I have now, can you imagine if they took money out and you get less?”³⁸ She was fortunate, with the help of a pro bono legal assistance program, she eventually got all of the judgments reversed.

There is only scattered empirical evidence to prove the point, but it seems clear that a large proportion of debt buyer cases involve defendants who are either poor or struggling at the margins of poverty. The suits also seem to fall disproportionately on minority communities. Dozens of attorneys, public officials, judges, and consumer advocates who spoke to Human Rights Watch agreed with this assessment, and the data that does exist also tends to reinforce the point.³⁹ This aspect of debt buyer impact raises particular concern because the disproportionate impact intersects with prohibited grounds of discrimination such as race, social origin, or status, and under human rights norms may constitute indirect discrimination.

A study by New Economy Project, a nonprofit organization, of debt buyer lawsuits in New York City found that in a sample of people with default judgments entered against them by debt buyers, 95 percent lived in low or moderate-income neighborhoods and that the majority lived in predominantly Black or Latino neighborhoods.⁴⁰ A 2015 *ProPublica* study found that in Newark, New Jersey; Chicago, Illinois; and St. Louis, Missouri, debt buyer lawsuits are “far more common” in Black neighborhoods than in others. In Newark, the study found that more than half of all court judgments entered against people living in predominantly Black neighborhoods stemmed from debt buyer suits.⁴¹ A New York program that provides pro bono legal advice to defendants in debt cases in the Bronx reports that “the vast majority of CLARO visitors have very low incomes.” More than half of its respondents reported income of less than \$1,500 per month, and more than half of the consumer credit cases brought to CLARO are debt buyer cases.⁴²

³⁸ Human Rights Watch telephone interview with Mary Corti, February 18, 2015.

³⁹ Human Rights Watch interviews with attorneys in Michigan, Maryland, New York, and Pennsylvania, 2014 and 2015; Human Rights Watch telephone interviews with attorneys in Minnesota, Florida, Missouri, Arkansas, and North Carolina, 2014 and 2015.

⁴⁰ New Economy Project, “Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers,” May 2010, http://www.neweconomynyc.org/wp-content/uploads/2014/08/DEBT_DECEPTION_FINAL_WEB-new-logo.pdf (accessed October 9, 2015) p. 1. Of a sample of 451 people who called a hotline set up by the New Economy Project to seek advice about how to respond to a debt buyer lawsuit, 69 percent were Black or Latino.

⁴¹ Paul Kiel and Annie Waldman, “The Color of Debt: How Collection Suits Squeeze Black Neighborhoods,” *ProPublica*.

⁴² Bronx CLARO Program, Fourth Quarter and Annual Report, 2014, on file with Human Rights Watch, p. 13.

An uneven patchwork of federal and state laws does protect a minimum core of poor defendants' income from garnishment or seizure by debt buyers or other creditors. But this legal framework is inadequate, and its protections often add up to far less than what a family needs to keep from being pushed deeper into poverty and financial instability by an adverse judgment. For example, federal law prohibits creditors from garnishing a debtor's social security payments, caps wage garnishments at 25 percent of a debtor's disposable income, and protects people's directly deposited federal benefits.⁴³

The laws in some US states provide additional protections, but a comprehensive study by the National Consumer Law Center found that "despite the importance of exemptions laws, *not one* US state meets five basic standards" to prevent garnishment and property seizures from destroying debtors' ability to earn a livelihood, pay basic utilities, housing, and transportation costs, and maintain a living wage. The NCLC report found that a handful of states—Alabama, Delaware, Kentucky, and Michigan—"allow debt collectors to seize nearly everything a debtor owns," with six others offering only marginally better protections.⁴⁴

Only handful of states prohibit creditors from garnishing a person's bank account to the point that it sinks below a prescribed minimum balance.⁴⁵ What this means, as *ProPublica* noted in a 2014 report, is that in many states "a collector can't take more than 25 percent of a debtor's paycheck, but if that paycheck is deposited in a bank, all of the money in the account can be grabbed to pay down the debt."⁴⁶ In Michigan, debt buyers and other creditors are able to garnish a debtor's entire state income tax return to satisfy a debt—a source of income that is particularly important to many poor US families.⁴⁷

⁴³ 15 U.S.C. § 1673 - Restriction on garnishment.

⁴⁴ National Consumer Law Center, "No Fresh Start: How States Let Debt Collectors Push Families into Poverty," October 2013, <http://www.nclc.org/issues/no-fresh-start.html> (accessed October 9, 2015), p. 3. The six states referenced above are Arkansas, Georgia, New Jersey, Pennsylvania, Utah, and Wyoming. For a summary of state laws on wage garnishment, see Fair Debt Collection, "Wages being garnished by debt collectors? Learn your state's wage garnishment laws," 2015, <http://www.fair-debt-collection.com/state-wage-garnishments.html> (accessed October 9, 2015).

⁴⁵ Chris Arnold and Paul Kiel, "With Debt Collection, Your Bank Account Could Be at Risk," *NPR and ProPublica*, September 16, 2014, <http://www.npr.org/2014/09/16/348709389/with-debt-collection-your-bank-account-could-be-at-risk> (accessed October 9, 2015).

⁴⁶ Chris Arnold and Paul Kiel, "Old Debts, Fresh Pain: Weak Laws Offer Debtors Little Protection," *NPR and ProPublica*, September 16, 2014, <http://www.propublica.org/article/old-debts-fresh-pain-weak-laws-offer-debtors-little-protection> (accessed October 9, 2015).

⁴⁷ Michigan Department of Treasury, "If Your Refund is Offset (Held) to Pay a Debt," 2015, http://www.michigan.gov/taxes/0,1607,7-238-43513_44135-168434--,00.html#garnishment (accessed October 9, 2015).

A 2015 study by *ProPublica* found that debt collection lawsuits of all kinds are disproportionately prevalent in Black communities. The study also highlighted a predominantly Black suburb of St. Louis called Jennings that is saturated with debt collection lawsuits, including debt buyer lawsuits. The study notes that:

The average family in Jennings has an income of just \$28,000, an income level at which, on average, families spend all of their income on basic necessities, federal survey data shows.... A garnishment hits this kind of household budget like a bomb.⁴⁸

Many leading debt buyers say that they only sue people who they believe possess the means to pay. But as an official with one leading debt buyer acknowledged to Human Rights Watch, “You are trying to do this the right way—to pick the ones that have the ability to pay but not the willingness. Do we always get that right? No.”⁴⁹

Runaway Interest and Costs

Most debt buyer lawsuits involve credit card debts, and long periods of alleged non-payment by the defendant. These two factors combine to produce jaw-dropping accumulations of interest in many debt buyer lawsuits. A debt buyer who purchases a credit card debt of \$2,000 carrying a 25 percent rate of compound interest would see the debt grow to \$6,103 if they waited 5 years to secure a court judgment against the debtor.

Such scenarios are quite common. Debt buyers often wait until close to the end of the applicable statute of limitations to secure a court judgment.⁵⁰ One official with a leading debt buying company maintained that this is primarily due to the cost of litigation rather than a desire to accumulate as much interest as possible. “Generally you try to collect by less expensive means right up until the statute of limitations is about to expire,” he said, “and only then do you file suit.”⁵¹

⁴⁸ Paul Kiel and Annie Waldman, “The Color of Debt: How Collection Suits Squeeze Black Neighborhoods,” *ProPublica*.

⁴⁹ DBA Interview, April 29, 2015.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

From the perspective of the person who is ultimately sued, a debt buyer's motives for waiting several years to sue after acquiring a debt are immaterial. That decision has the practical effect of growing a debt to its largest possible size. This can have a devastating impact on people who are already in economic distress. As Michigan Judge William Richards put it to Human Rights Watch:

A lot of them will admit they used the credit card but say, "There's no effing way I racked up such high charges." Then I have to explain compound interest to them. Typically the debt is several years old by the time LVNV or Midland sues. It's unfortunate. Memories fade. When they get hit with a lawsuit they say, "This is a joke. I can't owe that much." I tell them, "You admit you could have charged \$2,500. That, at 20 percent, is up to \$3,000 after just one year, then \$3,600 after two years." I say, "Do you see, ma'am, why you are on the hook for \$4,300?" And they are stunned—*stunned*.⁵²

After a judgment is handed down, post-judgment rates of interest that are either set or capped by state law kick in.⁵³ These are generally lower than the contract rates attached to credit card debts, but they are often quite high, multiple times the rate of inflation. Many states cap post-judgment interest at 10 percent or even higher.

In Michigan, post judgment rates of interest can be as high as 13 percent in many purchased debt cases.⁵⁴ Human Rights Watch examined one case where debt buyer Credit Acceptance Corporation secured a court judgment against a defendant for \$4,902.⁵⁵ In 2004 in Flint, a city that has long been a potent symbol of post-industrial US poverty.⁵⁵ In 2014, Credit Acceptance applied to have the judgment renewed, claiming that the debt had increased in size to \$11,440.⁹⁶ with 13 percent post-judgment interest.⁵⁶

⁵² Human Rights Watch interview with William Richards, district court judge, Southfield, MI, October 14, 2014.

⁵³ These can also be quite high, with many states capping it at or near 10 percent. See American Institute of CPAs, "Pre and Post Judgment Interest Analysis Matrix," 2015, http://www.aicpa.org/InterestAreas/ForensicAndValuation/Resources/EconomicDamages/pages/prejudgment-postjudgment-matrix.aspx?v_ID=85825566-6b9e-422d-b69b-20040bb270b4 (accessed October 9, 2015).

⁵⁴ Michigan Courts, "Interest Rates for Money Judgements under MCL 600.6013," July 1, 2015, <http://courts.mi.gov/administration/scao/resources/documents/other/interest.pdf> (accessed October 9, 2015).

⁵⁵ Michael Moore, *Roger & Me*, 1989.

⁵⁶ *Credit Acceptance Corp v. Kelly Banks*, Michigan 68th District Court, Case No. 03-7469GC, Motion to Renew Judgment, August 11, 2014, on file with Human Rights Watch.

For people who lack the means to make significant monthly payments, high rates of post-judgment interest can make it hard to make any headway paying off their balance, and substantially increase the amount they must ultimately repay. In a state that allows debt buyers to accrue 10 percent post-judgment interest, a debtor who is able to make consistent monthly payments of \$50 on a debt of \$3,000 will ultimately pay 30 percent more than a person of greater means who can afford to pay \$200 per month.⁵⁷

The impact of post-judgment interest becomes even more pronounced when a debtor fails to make consistent payments. Any period of lapsed payments can see all progress made in paying off their obligations wiped out or even reversed. In another case out of Flint, Midland Funding secured a judgment against an alleged debtor in 2004 for \$959.22 and began accumulating post-judgment interest at 13 percent as allowed by state law. Ten years later, the alleged debtor had made a total of \$735 in scattered payments to Midland, but had only managed to reduce the balance owed by \$12.⁵⁸

Human Rights Watch does not argue that debt buyers or other creditors should be barred from pursuing claims against people simply because they are poor. Rather, this report simply argues that because of the devastating financial impact a successful debt buyer lawsuit can have on people struggling to make ends meet, policymakers and the courts have a compelling interest in ensuring that the cases have merit and that justice is done. Courts should certainly take care to ensure that debt buyer plaintiffs are not able to secure judgments against the wrong people, for the wrong amounts, or in pursuit of debts that are not legally enforceable. But unfortunately and as this report describes, that is exactly what is happening in many courts across the US.

⁵⁷ The former would pay a total of \$4,176; the latter, \$3,218.

⁵⁸ *Midland Credit Management v. Belinda Leeper*, Michigan 68th District Court, Case No. 04-4791-GC, Account Statement, June 10, 2014, on file with Human Rights Watch.

Attorney's Fees

Some debt buyers routinely seek to charge defendants attorney's fees in the cases they win, a practice that can add further still to the misery inflicted by high rates of contract and post-judgment interest.

In Arizona, Human Rights Watch observed several cases brought by Cortez Investment Company, a debt buyer based in Tucson. Cortez regularly asked courts to order defendants to pay attorney's fees in excess of \$300 in cases where the underlying debt amounted to less than \$1,500. In one typical case, Cortez sought \$312 in attorney's fees and \$426 interest on a debt that was valued at \$1,422.51 when the company purchased it.⁵⁹

David Hameroff, the attorney who represents Cortez in thousands of cases filed across Arizona every year, is also the debt buyer's principal owner. In essence, the law allows him to force defendants—many of whom cannot afford an attorney of their own—to pay him a fee for using the courts to pursue them on his own behalf. Reached by phone, Hameroff declined to comment on his litigation practices.⁶⁰

⁵⁹ *Cortez Investment Co. v. Paul Emil Spacek and Rosemary Spacek*, Maricopa County Justice Court—North Valley Precinct, Case No. CC2014-054779, Statement of Facts, on file with Human Rights Watch.

⁶⁰ Human Rights Watch telephone call to David Hameroff, July 23, 2014.

Allegations of Error and Abuse in Debt Buyer Litigation

Debt buyer lawsuits have been plagued by instances of error and abuse. In thousands of cases across the country and as the following pages describe, debt buyers have:

- Prevailed against consumers in lawsuits that were legally deficient or should never have been filed, including suits that were barred because they were past the applicable statutes of limitations;
- Obtained default judgments against defendants who never received proper notice that they were being sued;
- Sued and won court judgments against—or garnished the wages of—the wrong people or for the wrong amounts;⁶¹ or
- Won court judgments that state and federal regulators or the courts later found to be rooted in false evidence or misleading, “robo-signed” affidavits.

The prevalence of these problems—and the extent to which they reflect malfeasance, incompetence, or genuine misunderstandings about the application of relevant law—is hotly contested.⁶² There can however be no serious dispute that the problems are real. In several cases, state and federal officials have forced leading debt buyers to pay fines, to vacate thousands of legally deficient or improperly obtained judgments, and/or to agree to reform their collections practices. For example:

- In January 2015, New York State reached a settlement with Encore Capital in a lawsuit alleging that the company had illegally sued consumers over debts that were time-barred by New York law. The settlement required Encore to vacate 4,500

⁶¹ Human Rights Watch studied one case in Michigan where a debt buyer called Web Equity Holdings garnished the wages of a woman who simply happened to have the same first and last name as the defendant in their case. When the matter came back in front of the court the plaintiff’s attorney said he could not explain how the mistake had happened and declined to elaborate further, citing attorney-client privilege. “Oh my goodness,” repeated Judge Herman Marable, over and over again. “Oh my goodness.” *Web Equity Holdings LLC v. Lauren Simpson*, 68th District Court, Flint, MI, Case No. 11-3027-GC, court documents and transcripts on file with Human Rights Watch.

⁶² It is worth noting that at any given point in time, roughly half of all consumer complaints about creditors made to the federal government’s Consumer Finance Protection Bureau (CFPB) allege that the consumer did not owe the debt, had already paid it, had discharged it in bankruptcy or owed less than was being claimed, or that the collector had provided insufficient information to allow the consumer to verify the debt’s legitimacy. See CFPB, “Consumer Complaint Database,” 2015, <http://www.consumerfinance.gov/complaintdatabase/> (accessed October 9, 2015). In 2013 the FTC noted that, “As the debt buyer industry has expanded, the Commission has also seen a significant rise in the number of debt collection complaints it received directly from consumers.” FTC, “Structure and Practices of the Debt Buying Industry,” p. 1.

- judgments worth roughly \$18 million, agree to reform its debt collection practices, and pay a \$675,000 penalty.⁶³ The state also alleged that Encore employees had “‘robo-signed’ ... hundreds of affidavits submitted in support of debt collection actions each day without reviewing the affidavits and without possessing personal knowledge, as alleged in the affidavits, about the claimed debts and the amounts owed.”⁶⁴ On the issue of time-barred debt, New York reached a similar settlement with debt buyers Portfolio Recovery Associates and Sherman Financial Group in 2014, vacating some 3,000 judgments worth \$16 million.⁶⁵
- In September 2015, the Consumer Finance Protection Bureau (CFPB) entered into a consent decree with Encore Capital and Portfolio Recovery Associates that requires the two companies to refund tens of millions of dollars to consumers, halt collection on more than \$100 million in debt, pay financial penalties, and overhaul their collections practices. The CFPB alleged that the two companies “bought debts that were potentially inaccurate, lacking documentation, or unenforceable. Without verifying the debt, the companies collected payments by pressuring consumers with false statements and churning out lawsuits using robo-signed court documents.”⁶⁶ In response, Encore said that the settlement related to “two isolated issues, which are not current practice and were changed some time ago” and that “the outcome is not about current law or rules already on the books, but instead

⁶³ New York Attorney General, “A.G. Schneiderman Obtains Settlement From Major Debt Buyer Who Filed Thousands Of Time-Barred Debt Collection Actions,” January 9, 2015, <http://www.ag.ny.gov/press-release/ag-schneiderman-obtains-settlement-major-debt-buyer-who-filed-thousands-time-barred> (accessed October 9, 2015); See also Jessica Silver-Greenberg, “Debt Buyer Faces Fine and Loss of Thousands of Court Judgments,” *New York Times*, January 8, 2015, <http://mobile.nytimes.com/blogs/dealbook/2015/01/08/debt-buyer-faces-fine-and-loss-of-thousands-of-court-judgments/> (accessed October 9, 2015). The allegations of time-barred suits revolved around New York’s “borrowing statute,” which requires plaintiffs’ lawsuits to be timely not only under New York’s statute of limitations (six years) but also under the statute of limitations that applies where the cause of action originated. In debt buyer lawsuits, this typically means the home state of the debt’s original creditor. N.Y. CPLR § 202 (McKinney 1972). Debt buyer representatives interviewed by Human Rights Watch contended that these allegations flowed from a novel application of the “borrowing statute” that neither they nor the courts had ever seriously contemplated at the time the cases were litigated. DBA interview, April 29, 2015.

⁶⁴ Allegations regarding the adequacy of the affidavits filed by debt buyer employees in support of litigation are discussed in more detail below. See below, Rubber Stamp Justice: Default Judgments without Evidence or Scrutiny, Allegations of “Robo-Signing.”

⁶⁵ New York Attorney General, “A.G. Schneiderman Announces Settlements with Two Major Consumer Debt Buyers for Unlawful Debt Collection Actions,” May 8, 2014, <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlements-two-major-consumer-debt-buyers-unlawful-debt> (accessed October 9, 2015).

⁶⁶ CFPB, “CFPB Takes Action against the Two Largest Debt Buyers for Using Deceptive Tactics to Collect Bad Debts,” September 9, 2015, <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-the-two-largest-debt-buyers-for-using-deceptive-tactics-to-collect-bad-debts/> (accessed October 9, 2015).

about the CFPB subjecting companies to its own interpretations that have never been codified or adopted.”⁶⁷

- In 2014, the CFPB filed a federal lawsuit against a Georgia law firm that files hundreds of thousands of cases every year on behalf of banks, debt buyers, and other creditors. The CFPB suit alleged that one attorney at the firm had signed over 130,000 lawsuits during a two year period. It accused the firm of “operating a debt collection lawsuit mill that uses illegal tactics to intimidate consumers into paying debts they may not owe” and alleged that it “churns out hundreds of thousands of lawsuits that frequently rely on deceptive court filings and faulty or unsubstantiated evidence.”⁶⁸
- In 2012, the US Department of Justice reached a settlement and consent decree in a suit against Asset Acceptance, a large debt buyer that has since been acquired by Encore Capital.⁶⁹ The suit alleged that the company had wrongfully tricked consumers into reactivating debts that the company could not otherwise have sued on because they were past the statute of limitations.⁷⁰ It also alleged that the company had “systematically failed to conduct reasonable investigations” when consumers claimed that the debts Asset Acceptance was trying to collect had already been paid or were not theirs. The company paid a \$2.5 million penalty and agreed to reform various aspects of its collections activities.⁷¹

⁶⁷ Encore Capital Group, “Encore Enters Settlement Agreement with Consumer Financial Protection Bureau,” September 9, 2015, <http://investors.encorecapital.com/phoenix.zhtml?c=115920&p=irol-newsArticle&ID=2086568> (accessed October 9, 2015).

⁶⁸ CFPB, “CFPB Files Suit against Debt Collection Lawsuit Mill,” July 14, 2014, <http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-debt-collection-lawsuit-mill/> (accessed October 9, 2015). In July 2015 a federal judge dismissed the defendant’s motion to dismiss the CFPB’s case. Tim Bauer, “Judge Issues Order Denying Defendant’s Motion to Dismiss in CFPB v. Hanna Debt Collection Litigation,” *insideARM*, July 14, 2015, <http://www.insidearm.com/daily/debt-collection-news/debt-collection/judge-issues-order-denying-defendants-motion-to-dismiss-in-cfpb-v-hanna-debt-collection-litigation> (accessed October 9, 2015).

⁶⁹ Asset Acceptance was acquired by Encore Capital in June 2013.

⁷⁰ When a debt passes the statute of limitations, consumers are still obligated to pay but creditors can no longer file suit to recover the money. In some states, however, consumers can reset the statute of limitations on a debt they owe if they promise to pay the debt or make a partial payment. Debt that is reactivated in this way is sometimes referred to as “zombie debt” because the threat of a creditor lawsuit is effectively resurrected from the dead.

⁷¹ US Department of Justice, “Justice Department Settles Case Against One of Nation’s Largest Debt Buyers,” January 30, 2012, <http://www.justice.gov/opa/pr/justice-department-settles-case-against-one-nation-s-largest-debt-buyers> (accessed October 9, 2015); See also Jessica Silver-Greenberg, “U.S. Gets Tougher on Debt Collecting,” *Wall Street Journal*, January 31, 2012, <http://www.wsj.com/articles/SB10001424052970203920204577193283804868986> (accessed October 9, 2015).

- In 2011, Encore Capital agreed to settle a raft of class action lawsuits involving at least 1.4 million plaintiffs for \$5.7 million.⁷² Thirty-eight state attorneys general publicly opposed the deal, arguing that it did not hold Encore meaningfully accountable and would help it and other debt buyers evade meaningful enforcement and accountability down the line. Federal regulators also criticized the deal for similar reasons.⁷³

A deeply troubling common thread runs through all of these cases, and many others. In courts across the country, debt buyers have been consistently able to secure large numbers of illegitimate judgments against alleged debtors on the strength of evidence that is later exposed as inadequate, deceptive, or inaccurate.⁷⁴ When commentators rush to condemn the debt buying industry itself, there is one question they do not ask often enough: how is any of this possible, if the courts are doing their job?

⁷² Jessica Silver-Greenberg, “Encore Is Settling Class-Action Suit,” *Wall Street Journal*, February 18, 2011, <http://www.wsj.com/articles/SB10001424052748703561604576150601851774000> (accessed October 9, 2015).

⁷³ Jessica Silver-Greenberg, “Judge Backs Pact on Debt Lawsuit,” *Wall Street Journal*, August 14, 2011, <http://www.wsj.com/articles/SB10001424053111904823804576507092200412576> (accessed October 26, 2015).

⁷⁴ For a good overview of existing literature on this topic, see Peter Holland, “Junk Justice: A Statistical Study of 4400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*, pp. 199-204.

Rubber Stamp Justice: Default Judgments without Evidence or Scrutiny

More than a few public officials have spoken out publicly against debt buyers who, in the words of New York Attorney General Eric Schneiderman, “abus[e] the power of the courts at the expense of hardworking families.”⁷⁵ Similarly, in November 2015 a Missouri trial court judge lambasted debt buyer Portfolio Recovery Associates’ entire business model as “irresponsible” and “reprehensible:”

This Defendant owns debt in all 50 states—750,000 accounts in Missouri, 37,500 of which are in litigation. It shows no remorse. Its business model is irresponsible and preys against the financially vulnerable. This Defendant does not respect the Court’s rules. And, especially reprehensible is Defendant’s use and abuse of our court system to harm the Plaintiff.⁷⁶

These are stirring words, but the myriad problems with debt buyer litigation do not add up to a simple story of corporate malfeasance or incompetence. As this report describes, the courts’ own failures and shortcomings are a key part of the problem. The problem with statements like the two cited above is that they cast the courts as innocent bystanders, or perhaps even a second set of victims. In reality, the courts are central to the problem and bear direct responsibility for the translation of defective lawsuits into court judgments that hurt poor families. As Karen Meyers, then-New Mexico’s assistant attorney general for consumer protection, put it to Human Rights Watch, “It’s a perfect storm of attorneys not doing their due diligence before filing a claim, the client not actually having the evidence

⁷⁵ New York Attorney General, “A.G. Schneiderman Obtains Settlement From Major Debt Buyer Who Filed Thousands Of Time-Barred Debt Collection Actions,” January 9, 2015, <http://www.ag.ny.gov/press-release/ag-schneiderman-obtains-settlement-major-debt-buyer-who-filed-thousands-time-barred> (accessed October 9, 2015). There is also a growing body of academic literature on the topic. See, for example, Peter Holland, “Junk Justice: A Statistical Study of 4400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*; Niel L. Sobol, “Protecting Consumers from Zombie-Debt Collectors,” *New Mexico Law Review*, No. 327 (2014), <http://ssrn.com/abstract=2350555> (accessed October 9, 2015); Dalie Jimenez, “Dirty Debts Sold Dirt Cheap,” *Harvard Journal on Legislation*, pp. 41-124.

⁷⁶ *Portfolio Recovery Associates v. Guadalupe Mejia*, Circuit Court of Jackson County, MO, Case No. 1216-CV34184, Judgment/Order, November 4, 2015, <http://www.creditreportproblems.com/wp-content/uploads/2015/11/order-on-PRA-post-trial-motions.pdf> (accessed December 16, 2015).

that they are really owed the debt, and the judges saying, ‘Well, it’s a default judgment so I just sign the papers, I don’t ask.’”⁷⁷

As the following pages explain, by now the courts that adjudicate debt buyer lawsuits ought to know that these cases raise unique and pervasive evidentiary concerns, as well as the potential for widespread error and abuse. They should also know that many of the defendants in debt buyer cases are poor enough that an adverse judgment can be devastating to their families’ precarious financial stability, and that they often lack the means to mount an effective legal defense. Yet many courts take no proactive steps to confront these problems. Many low-level courts across the country churn out judgments in favor of debt buyer plaintiffs without asking for any meaningful evidence—and indeed without subjecting the plaintiffs’ claims to any real scrutiny at all.

The Default Judgment Problem

The central reality of debt buyer litigation is that only a tiny proportion of cases ever go to trial. In a typical court, between 60 and 95 percent of all debt collection lawsuits, including debt buyer cases, end with default judgments in favor of the plaintiffs.⁷⁸ Most defendants either do not answer the case against them at all, or do not appear to defend themselves in court.⁷⁹

Where are the Defendants?

In Arizona, the presiding judge of the Maricopa County Justice Courts told Human Rights Watch that he attributed the low rate of defendant participation in debt buyer cases largely to “despair” on the part of alleged debtors who feel helpless in the face of debts they

⁷⁷ Human Rights Watch telephone interview with Karen Meyers, New Mexico assistant attorney general for consumer protection, June 25, 2014. As of December 2015, Meyers had moved to a post at the federal government’s Consumer Financial Protection Bureau.

⁷⁸ In 2009, experts convened by the FTC estimated that across most jurisdictions, 60 to 95 percent of debt buyer cases end with default judgments entered in favor of the plaintiffs. FTC, “Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration,” p. 7. In 2015, in response to a query about default rates from Human Rights Watch, debt buyer industry association DBA International said that it does not track the default rates in cases filed by its member companies and cited to the abovementioned FTC figures as an appropriate benchmark. DBA Letter, April 17, 2015. More recent studies continue to bear out the expert impressions compiled by the FTC. See, for example Peter Holland, “Junk Justice: A Statistical Study of 4400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*, pp. 211-215; New Economy Project, “Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers,” pp. 8-14.

⁷⁹ This is a problem common to other types of consumer credit litigation as well. As the FTC noted in a 2010 study, “Most alleged debtors fail to answer complaints or otherwise defend themselves in debt collection actions.” FTC, “Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration,” p. 7.

cannot afford to pay.⁸⁰ Debt buyers and their attorneys, for their part, often cast defendants' failure to respond to a lawsuit as a failure of personal responsibility. Greg Call, General Counsel of Encore Capital, put it this way:

By the time [a debt] reaches me, our consumer is part of a subset of people who've survived so far by failing to engage with the problem. Our consumer in this space has built up what until this point in the process has been a very effective defense mechanism which is, "If I ignore it I don't have to deal with it." ... That works up until the litigation process starts. If you continue to deploy that defense mechanism at that stage, the immediate byproduct of that is a default judgment.⁸¹

There is truth to this analysis with respect to some defendants. But the overwhelming silence of alleged debtors sued by debt buyers—in cases they have a clear financial interest in contesting—is a complex phenomenon whose underlying causes are widely debated.⁸²

Confusion and Misinformation

Many alleged debtors have never heard of the debt buying industry, let alone the particular company suing them. Furthermore, they generally have no way of knowing that a creditor they did business with sold their debt to a third party until the debt buyer itself informs them of the fact. Some states require debt buyers to clearly identify the original source of the debt when issuing notice of a lawsuit to a defendant, but others do not. One Michigan judge told Human Rights Watch that he regularly entered default judgments in favor of debt buyers only to see the alleged debtor later try to have it overturned, explaining that

⁸⁰ Human Rights Watch interview with Stephen McMurray, presiding judge of the Maricopa County justice courts, Phoenix, AZ, July 22, 2014.

⁸¹ Human Rights Watch telephone interview with Greg Call and Ashish Masih, June 11, 2015.

⁸² The FTC noted that during expert consultations, "[i]n general, industry representatives asserted that most debtors who default do so because they owe the debt and therefore recognize that disputing it would be futile. Consumer advocates, on the other hand, generally attributed the low participation rate to debtors not receiving notice of the action or to procedural hurdles that make it difficult and expensive for debtors to defend." FTC, "Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration," p. 7.

they had initially failed to answer the complaint because they “had no idea who these people were.”⁸³

The overwhelming majority of defendants in debt buyer cases lack legal representation, and for them, the basic requirement that they respond to a debt buyer lawsuit can be overwhelming.⁸⁴ In New York, Human Rights Watch interviewed a woman named Mary who was sued by several debt buyers. She ultimately prevailed in all of the cases against her. Mary told Human Rights Watch she doubted whether she would even have managed to answer the complaints had she not gotten pro bono legal assistance from a program called CLARO.⁸⁵ “The papers they send you in the mail—‘reference this, reference that,’—it can make you crazy just looking at it,” she said. “They send you this long thing referencing this case and that case and I’m just like, ‘What in the world does this mean?’”⁸⁶

Whether inadvertently or by design, some debt buyer attorneys contribute to this problem by serving defendants with complaints that make the act of responding to the case seem more complicated than it really is. Some attorneys who defend people in debt buyer lawsuits allege that this can be a deliberate tactic. Michigan consumer rights attorney Ian Lyngklip told Human Rights Watch that some debt buyer attorneys “send out reams and reams of paper that they can churn out with the click of a button. People have no idea how to answer it all and they effectively cause them to default even if they are trying to answer. They are overwhelming people with paper and expertise they can’t handle.”⁸⁷

Greg Call of Encore Capital acknowledged that the notice defendants receive from debt buyers can be daunting, while rejecting the idea that this was deliberate. He told Human Rights Watch that:

Lawyers are horrible at dumbing down their average work product to the average reading level of our consumer. We generally shoot for a seventh or eighth grade reading level. They are trying in good faith to communicate,

⁸³ Human Rights Watch interview with William Richards, 46th District Court judge, Southfield, MI, October 14, 2014.

⁸⁴ See below, *Thrown to the Wolves: Unrepresented Defendants in Court*.

⁸⁵ CLARO is the Civil Legal Advice and Resource Office, a program that provides pro bono legal advice and other support to low-income New Yorkers being sued by debt collectors, including debt buyers. CLARO, “Why come to CLARO?” 2011, <http://www.claronyc.org/claronyc/default.html> (accessed October 9, 2015).

⁸⁶ Human Rights Watch telephone interview with Mary Corti, February 18, 2015.

⁸⁷ Human Rights Watch telephone interview with Ian Lyngklip, April 10, 2014.

but to the average consumer it's what you described—it's too dense, it's intimidating, and it's scary.⁸⁸

Human Rights Watch reviewed several Arizona cases in which Cortez Investment Company, a Tucson-based debt buyer filed for summary judgment against unrepresented defendants. The justice of the peace assigned to those cases told Human Rights Watch that “many if not most judges are simply looking for something that disputes a material fact, even if it is filed in the wrong format. Our clerks are train[ed] never to reject a pleading.”⁸⁹ But defendants have no way of knowing that if they do not have access to sound legal advice, and would never guess it from the correspondence they received from Cortez. The company served defendants with motions for summary judgment asserting that any reply must include “affidavits, exhibits, or other material that establishes each fact as admissible evidence” and a “memorandum of law that ... provides legal authority in support of your position.”⁹⁰

Concerns about Notice

Many people claim that they were not aware that a debt buyer had sued and won a judgment against them until the plaintiff began garnishing their paychecks or secured a court order seize their property.⁹¹ Many of these claims are false or mistaken, but inadequate notice and even “sewer service”—when process servers falsely claim to have served a defendant with notice—have been real problems in many debt buyer lawsuits.

Debt buyer lawsuits may be unusually prone to bad service simply because the plaintiffs often have no idea where their alleged debtors—people they have had no prior contact or relationship with—live when they purchase the accounts. Addresses passed on to them at the time of sale may be years out of date, and other basic information that might help locate the alleged debtors may be sparse or marred by inaccuracies. This is particularly

⁸⁸ Human Rights Watch telephone interview with Greg Call and Ashish Masih, June 11, 2015.

⁸⁹ Human Rights Watch email correspondence with Gerald Williams, Maricopa County Justice of the Peace, North Valley Precinct, Surprise, AZ, July 22, 2015.

⁹⁰ *Cortez Investment Co. v. Paul Emil Spacek and Rosemary Spacek*, Maricopa County Justice Court—North Valley Precinct, Case No. CC2014-054779, Plaintiff's Motion for Summary Judgment, on file with Human Rights Watch.

⁹¹ In 2010, the nonprofit New Economy Project reported that out of a sample of 451 New York residents sued by debt buyers who called the organization's hotline to seek advice, 71 percent reported that they had not been served or were served incorrectly. New Economy Project, “Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers,” p. 1.

true of debts that have been sold multiple times across different buyers and are several years old. Robert Warner, president of the Michigan creditor's bar and himself a debt buyer, acknowledged to Human Rights Watch that, "We're certain that many, many people—not everyone—receives the summons and complaint. You can't be sure in all cases."⁹²

Industry critics allege that some debt buyers or their attorneys cut corners when serving notice because a default judgment is the cheapest and most efficient way to prevail in court. Pat Clawson, a process server in Flint, Michigan who is also the vice president of a statewide association of process servers told Human Rights Watch that:

Almost anybody can be found using online information combined with shoe leather. But it requires some work. Most of these law firms and debt buyers do not want to do this. They don't want to take the effort it takes to find people.... They want to spend zero money and pretend that they know they've actually served their defendant.⁹³

Allegations of "sewer service" have repeatedly arisen in the context of debt buyer litigation. A recent class action lawsuit in New York alleged that more than 100,000 people were victimized by a "default judgment mill" that used "sewer service" as a tactic to obtain default judgments in debt buyer lawsuits.⁹⁴ In November 2015, the suit was settled under terms that require the defendant debt buyers to pay \$59 million to the plaintiffs' class and curb some of the defendants' collection practices.⁹⁵

⁹² Human Rights Watch telephone interview with Rob Warner, Jan Stieger, and Brian Fair, June 12, 2015.

⁹³ Human Rights Watch telephone interview with Pat Clawson, October 16, 2014. Industry critics allege that some collections law firms make sewer service almost inevitable by paying process servers as little as \$5 per service, rates that may make it deeply uneconomical to serve defendants properly.

⁹⁴ Ray Rivera, "Suit Claims Fraud by New York Debt Collectors," *New York Times*, December 30, 2009, http://www.nytimes.com/2009/12/31/nyregion/31debt.html?_r=0 (accessed October 9, 2015); *Monique Sykes, et al. v. Mel S. Harris & Associates, LLC, et al.*, United States Court of Appeals for the Second Circuit, 2015, http://www.ca2.uscourts.gov/decisions/isysquery/dcd9cb61-778d-4dc7-a527-584735529d74/1/doc/13-2742comb_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/dcd9cb61-778d-4dc7-a527-584735529d74/1/hilite/ (accessed October 9, 2015); New York Attorney General, "The New York State Attorney General Andrew M. Cuomo Announces Arrest Of Long Island Business Owner For Denying Thousands Of New Yorkers Their Day In Court," April 14, 2009, <http://www.ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-arrest-long-island-business> (accessed October 9, 2015); Jonathan D. Glater, "N.Y. Claims Collectors of Debt Used Fraud," *New York Times*, July 22, 2009, <http://www.nytimes.com/2009/07/23/business/23cuomo.html> (accessed October 9, 2015).

⁹⁵ Benjamin Mueller, "Victims of Debt Collection Scheme in New York Win \$59 million in settlement," *New York Times*, November 13, 2015, <http://www.nytimes.com/2015/11/14/nyregion/victims-of-debt-collection-scheme-in-new-york-win-59-million-in-settlement.html?smprod=nytcore-iphone&smid=nytcore-iphone-share> (accessed December 16, 2015).

One New York woman who had a default judgment entered against her in a debt buyer case told Human Rights Watch that, “The process server said he’d served a 200 pound white man with glasses,” she recalled. “My husband at the time was a dark-skinned Hispanic man.” She was eventually able to have the judgment overturned with the help of a free legal assistance program.⁹⁶

Nationally, there is no empirical data to indicate whether failure to serve defendants properly is a significant cause of the high default rates in debt buyer cases. Some state court systems have begun taking proactive steps to help ensure that defendants are properly served in debt buyer lawsuits.⁹⁷ But many other courts rely exclusively on plaintiffs to ensure that defendants are served notice of a lawsuit and do little to ensure compliance. This leaves them with no way of determining whether defective service is a significant problem in the debt buyer cases they adjudicate. When Human Rights Watch asked one Arizona justice of the peace whether he thought most of the defendants he had issued default judgments against in debt buyer cases had been properly served notice he replied simply, “We don’t know.”⁹⁸

Rubber Stamp Justice: The Absence of Judicial Scrutiny

Courts are not required to issue default judgments simply because a defendant fails to appear or otherwise defend herself. They do so at their own discretion after considering whether the claims are lawful and appear to have merit.

As the following pages describe, debt buyer lawsuits have been marred by a unique combination of profound evidentiary problems. Debt buyers do not always possess evidence in support of their legal claims, and the evidence they do possess has sometimes been explicitly flagged as unreliable by the creditors who generated it.

Despite all this, many judges behave as though debt buyer plaintiffs are entitled to default judgments as a matter of right when defendants fail to answer the case against them. They issue default judgments to debt buyers with alarming automaticity and speed, without

⁹⁶ Human Rights Watch telephone interview with Mary Corti, February 18, 2015.

⁹⁷ New York, for instance, requires debt buyer plaintiffs to provide courts with a stamped envelope bearing the address of the defendant

⁹⁸ Human Rights Watch interview with Judge Gerald Williams, Surprise, AZ, July 21, 2014.

asking for evidence in support of the claims or subjecting them to scrutiny. Many courts neither ask for nor receive any evidence that debt buyers are suing the correct people for the correct amounts, that they are legally entitled to sue, or that they actually own the debts at issue. In fact, many courts issue judgments in favor of debt buyers without knowing whether the plaintiffs even have access to any evidence in support of their claims. As one leading study of debt buyer litigation practices put it:

Instead of proof, arguably creditors rely on a de facto system of “default judgment justice” wherein the creditors know that very few defendants will ever challenge the lawsuit, and overwhelmed courts and judges will simply enter default judgments in order to keep the flood of paperwork from bringing the workflow to a halt.⁹⁹

One Arizona justice of the peace told Human Rights Watch that he had processed 60 default judgments in debt buyer cases at home over the course of about four hours on a Sunday afternoon, a rate of one default judgment every four minutes assuming that he worked without pause.¹⁰⁰ In many courts, default judgments are actually processed—and for all practical purposes decided—by clerks or other non-judicial court personnel. In Philadelphia’s municipal court a Human Rights Watch researcher watched a trial commissioner (an employee of the court who works under a judge) process more than 100 default judgments in the space of just two hours while simultaneously presiding over another proceeding.¹⁰¹

Human Rights Watch asked New York Chief Judge Jonathan Lippman for his perspective on the default judgment problem in debt buyer cases, which his courts have recently become more proactive in trying to tackle responsibly:

You were signing a lot of shallow judgments. It’s hard to make a blanket statement that they all had merit.... We have all been remiss in letting these

⁹⁹ Peter Holland, “Junk Justice: A Statistical Study of 4400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*, p. 184.

¹⁰⁰ Human Rights Watch interview with Justice of the Peace (name withheld), Maricopa County, AZ, July 2014.

¹⁰¹ Human Rights Watch court observation, February 4, 2015. At the end of the proceeding—described in more detail below—the trial commissioner on duty in the courtroom told Human Rights Watch that while it was on going, he had entered more than 100 default judgments against people who had failed to appear.

large purchasers of debt rule the day in court without ensuring the basic principles of setting court judgments based on evidence are met.... You can't get by just by throwing a spreadsheet at us or some kind of form affidavit that does not tell us anything. We get cases with the wrong debtor being sued, cases with the wrong amount of debt being sued for, and cases with no proof that should warrant a judgment.¹⁰²

New York and a handful of other states have taken steps to increase the evidence required from debt buyers before they can obtain a default judgment. Most states, though, have taken no steps to tackle the unique challenges these cases present to the integrity of the courts. A few states have gone in the wrong direction, exacerbating the problem with laws aimed at reducing courts' ability to question the evidence in support of uncontested debt buyer lawsuits.¹⁰³

Questionable Records and the Problem of Warranty

Debt buyers win many default judgments without ever possessing the kind of evidence they would need to prevail at trial against a competent defense. In some cases, the creditor selling a debt refuses to provide any detailed records to the purchaser. Sometimes, the buyers obtain only a simple spreadsheet with a few cells of information—such as names, social security numbers, amounts allegedly owed, and last known addresses—related to thousands of different accounts.¹⁰⁴

What's more, in some of the contracts underlying the sale of consumer debt the seller explicitly refuses to warrant that any of the information it has provided about the debts being sold is accurate. In one widely circulated agreement governing the sale of a portfolio of debt to a large debt buyer called CACH, the seller explicitly refused to warrant:

- That the amounts allegedly owed were accurate;
- That the loans complied with any relevant federal or state laws; or

¹⁰² Human Rights Watch interview with Chief Judge Jonathan Lippman, New York City, November 13, 2014.

¹⁰³ See below, Explanation of Key Recommendations for Governments, Courts, and Debt Buyers.

¹⁰⁴ Contracts for the sale of debt usually allow debt buyers to request further documentation on particular accounts if needed, but some contracts sharply limit the number of requests that can be made and/or impose fees that discourage debt buyers from doing so. See Dalie Jimenez, "Dirty Debts Sold Dirt Cheap," *Harvard Journal on Legislation*, p.29; FTC, "Structure and Practices of the Debt Buying Industry," p. iii.

- That any of the loans being sold were valid, enforceable, or collectable.¹⁰⁵

For good measure the agreement also declined to warrant “any other matters related to the loans.”¹⁰⁶ Debt buyers who go on to file lawsuits in situations like this do so without any sound basis for believing that they are suing the right people for the right amounts, or even that the debts they have purchased are real.

One independent study by Dalie Jiminez, a professor at University of Connecticut Law School, examined a set of 84 sale agreements and concluded that “in many contracts, sellers disclaim all warranties about the underlying debts sold or the information transferred.”¹⁰⁷ In 2013, the Federal Trade Commission concluded that leading debt buyers generally “obtained very few documents related to the purchased debts at the time of sale or after purchase” and that “sellers generally disclaimed all representations and warranties with regard to the accuracy of the information they provided at the time of sale about individual debts.”¹⁰⁸

The FTC study was based on sales of debt made in 2008. Officials with several leading debt buyers told Human Rights Watch that these problems are rapidly becoming a thing of the past, at least when it comes to new portfolios of debt being sold by banks. Those interviewees maintained that most current contracts for the sale of purchased debt include reasonable warranties of accuracy and that industry trends are moving rapidly in that direction, partly because banks are under increasing regulatory pressure to do so.¹⁰⁹ One official with a leading debt buying company told Human Rights Watch that contracts like the one described above are “outliers” that attract a disproportionate amount of public scrutiny because “it’s a really fun anecdote to tell.”¹¹⁰

There is no publicly available empirical data to prove the point one way or the other. Neither sellers nor debt buyers publish the terms of these contracts, and most courts do

¹⁰⁵ Loan Sale Agreement between FIA Card Services and CACH, LLC, April 14, 2010, <https://www.documentcloud.org/documents/329733-fia-to-cach-forward-flow.html> (accessed October 9, 2015), starting section 9.4.

¹⁰⁶ Ibid.

¹⁰⁷ Dalie Jiminez, “Dirty Debts Sold Dirt Cheap,” *Harvard Journal on Legislation*, p. 1.

¹⁰⁸ FTC, “Structure and Practices of the Debt Buying Industry,” pp. iii and 24-28.

¹⁰⁹ DBA meeting, April 29, 2015.

¹¹⁰ Ibid.

not require debt buyers to disclose them when filing a lawsuit.¹¹¹ But the SEC filings of publicly traded debt buyers undercut industry assertions to some degree. Industry leader Portfolio Recovery Associates, for example, noted in its March 2015 10-K filings that:

In pursuing legal collections, we may be unable to obtain accurate and authentic account documents for accounts that we purchase, and despite our quality control measures, we cannot be certain that all of the documents we provide are error free.¹¹²

The reality may simply be that there continues to be wide variation in the warranties different debt buyers are able to obtain from different creditors. Greg Call of Encore Capital told Human Rights Watch that, “We stand downstream from banks and are buying a product from them. The warranties we get largely reflect our negotiating position with the banks in the course of that transaction.”¹¹³

It is also important to emphasize that prevailing trends with regard to new contracts governing the sale of charged-off debt are of only limited immediate relevance to the courts. Hundreds of thousands—perhaps millions—of the debt buyer lawsuits now working their way through the courts relate to debts that were sold several years ago, with some being resold multiple times in the interim.

¹¹¹ Peter A. Holland, “Make Debt Buyers Disclose Forward Flow Agreements,” *American Banker*, November 5, 2013, <http://www.americanbanker.com/bankthink/make-debt-buyers-disclose-forward-flow-agreements-1063382-1.html> (accessed October 9, 2015).

¹¹² PRA Group, 10-K, March 2015, p. 19.

¹¹³ Human Rights Watch telephone interview with Greg Call and Ashish Masih, June 11, 2015.

A “Gold Standard” That Falls Short

The Debt Buyers Association International (DBA) is an industry association of US debt buyers and related firms that counts 38 debt buyers among its members, a mix of industry leaders and smaller firms. DBA has developed a code of ethics and a voluntary certification program for its debt buyer members. The group describes these as the “gold standard” of good industry practice with a “focus on the protection of the consumer.”¹¹⁴ DBA also maintains that “due in part” to the development of these standards, “most” contracts now contain basic warranties of accuracy and lawfulness.¹¹⁵

DBA’s certification standard does not actually require member companies to secure such warranties, however. Instead, it requires only that they use “commercially reasonable efforts” to negotiate the inclusion of warranties that:

- The seller actually owns the accounts it is selling to the debt buyer;
- The accounts being sold are “valid, binding, and enforceable obligations;”
- The accounts were “originated and serviced in accordance with law;” and
- That the data sellers provide to debt buyers about the accounts is “materially accurate and complete.”¹¹⁶

If “commercially reasonable” efforts to negotiate the inclusion of these assurances fail, member companies remain free to enter into sale agreements that do not contain any of them. The standard provides no definition of or guidance on what constitutes a “commercially reasonable” effort.

Many courts have failed to appreciate the importance of the warranty problem. Because the original creditors in debt buyer cases were usually banks, courts tend to assume that debt buyers have records just as reliable as those a bank would be able to produce in a lawsuit on its own behalf. In 2014, Maryland’s highest court decided a case that hinged partly on the reliability of account statements submitted by debt buyers by referring without discussion to past decisions that presume bank records to have a “strong indicia of reliability.” In a dissent to that ruling, one judge noted pointedly that:

It seems odd to accord special reliability to those records when the businesses that actually created and maintained them may have

¹¹⁴ DBA International, “About DBA,” 2015, <http://www.dbainternational.org/about-dba/> (accessed October 9, 2015).

¹¹⁵ DBA Letter, April 17, 2015.

¹¹⁶ DBA International, “Receivables Management Certification Program, Program Overview,” January 2015, http://www.dbainternational.org/members_only/certification/ProgramOverview_v3.0.pdf (accessed October 9, 2015).

disclaimed their reliability ... we should not decide these cases by according special reliability to the business records offered by one party to a dispute, particularly when they belong to a third party and there may be a legitimate question as to their accuracy.¹¹⁷

Courts' failures to make inquiries on this fundamental point gives rise to a situation where in at least some cases:

- Debt buyers may have no real way of knowing whether they are suing the correct people for debts they actually owe, and for the correct amount; and
- Courts issue default judgments in favor of debt buyers without knowing whether the plaintiff possesses reliable evidence in support of their claim.

These are not just hypothetical problems. In July 2015, the CFPB, 47 state attorneys general, and the District of Columbia alleged that JP Morgan Chase had sold debts on to debt buyers that:

- Were fraudulent and not actually owed by the alleged debtor;
- Had already been paid in full;
- Were not actually owned by Chase at the time of their "sale;" or
- Were otherwise uncollectable.

Chase also provided debt buyers with inaccurate information about the amounts owed on some accounts. In doing so, the CFPB noted, "Chase subjected certain consumers to debt collection by its debt buyers on accounts that were not theirs, in amounts that were incorrect or uncollectable." Chase agreed among other things to pay \$166 million in penalties, to pay some \$50 million directly to impacted consumers, to permanently halt collections on more than 528,000 accounts, and to reform its debt sales practices.¹¹⁸

¹¹⁷ *Rainford G. Bartlett v. Portfolio Recovery Associates, LLC* and *James Townsend v. Midland Funding, LLC*, Court of Appeals of Maryland, Case No. 24-C-13-001323 (*Bartlett*) and Case No. 24-C-13-001033 (*Townsend*), Opinion by Judge McDonald, May 19, 2014, <http://www.mdcourts.gov/opinions/coa/2014/64a13.pdf> (accessed October 9, 2015), pp. 3-5.

¹¹⁸ United States of America Consumer Financial Protection Bureau, Administrative Proceeding, File No. 2015-CFPB-0013, In the Matter of: CHASE BANK, USA N.A. and CHASE BANKCARD SERVICES, INC, Consent Order, July 2015, http://files.consumerfinance.gov/f/201507_cfpb_consent-order-chase-bank-usa-na-and-chase-bankcard-services-inc.pdf (accessed October 9, 2015). In 2013, Reuters reported that an internal audit had revealed errors in nearly 10 percent of all credit card collections lawsuits filed by Chase. "Nearly 1 in 10 JPMorgan debt collection lawsuits had errors," Reuters, July 10, 2013, <http://perma.cc/AW7L-U8X4> (accessed October 9, 2015).

Allegations of “Robo-Signing”

Courts generally require plaintiffs to submit an affidavit by an employee or agent, attesting that they have personal knowledge of the debt at issue and believe that the allegations presented in the lawsuit are true and accurate.¹¹⁹ But as an official with Sherman Financial Services acknowledged to Human Rights Watch, the only thing a debt buyer employee can truthfully attest to is that the information presented in a lawsuit matches the information contained in whatever records were passed on to the debt buyer at the time of sale.¹²⁰ Since debt buyers generally use those same records to automatically generate the data presented in a lawsuit, this exercise in verification is essentially circular and substantively meaningless. Simply put, the affiant has done nothing more than compare a few lines of data against computer-generated copies of themselves.¹²¹

Several high-profile lawsuits against debt buyers have featured evidence that employees sign hundreds of affidavits every day with little pretense of reviewing them for accuracy. For instance:

- In a deposition connected to a suit against Encore Capital in Ohio, a company employee testified that he signed between 200 and 400 affidavits a day and that few of them were reviewed for accuracy.¹²²
- An employee of leading debt buyer Portfolio Recovery Associates testified in one trial that he signed as many as 200 affidavits a day. Portfolio has long said that its affidavits are produced in accordance with a “very rigorous set of policies and

¹¹⁹ This is largely to ensure conformity with the “business records exemption” to the general bar on hearsay evidence. Briefly stated, this permits business records that would otherwise constitute inadmissible hearsay to be admitted as evidence if they were produced in the ordinary course of business, provided that the custodian of the record is sufficiently familiar with that business to attest to this fact. See, for example, The Clinton Law Firm, “The Business Records Exception to the Hearsay Rule,” March 22, 2011, http://www.martindale.com/litigation-law/article_The-Clinton-Law-Firm_1258444.htm (accessed October 9, 2015).

¹²⁰ DBA Interview, April 29, 2015.

¹²¹ In 2015, a trial court in Idaho reversed a summary judgment entered in favor of Midland Funding in a debt buyer case that rested on three affidavits and several attached documents. The court held that “[t]he problem with these affidavits and the documents attached to them is that essential evidentiary underpinnings are completely lacking.” *Midland Funding, LLC v. Barry Stimpson*, District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, Memorandum Decision, December 16, 2014, <http://www.hollandlawfirm.com/wp-content/uploads/Midland-Funding-v.-Stimpson-Id.-Dist.-Ct.-2015.pdf> (accessed October 9, 2015). See also Holland Law Firm, “Defective Debt Buyer Affidavits and the Lack of Data Integrity: Other People’s Records (‘OPR’) are Not ‘Business Records’ of Midland Funding,” September 24, 2015, <http://www.hollandlawfirm.com/debt-buyers/defective-debt-buyer-affidavits-and-the-lack-of-data-integrity-other-peoples-records-opr-are-not-business-records-of-midland-funding/> (accessed October 9, 2015).

¹²² Jessica Silver-Greenberg, “Encore Is Settling Class-Action Suit,” *Wall Street Journal*, February 18, 2011, <http://www.wsj.com/articles/SB10001424052748703561604576150601851774000> (accessed January 13, 2016); Jessica Silver-Greenberg, “Debtor Arrests Criticized,” *Wall Street Journal*, November 22, 2011, <http://www.wsj.com/articles/SB10001424052970203710704577052373900992432> (accessed October 26, 2015).

procedures,” but a 2010 investigation revealed that the company had filed thousands of lawsuits that included affidavits supposedly “signed” by a woman who had been dead since 1995.¹²³

- In a sworn deposition connected to a civil lawsuit, an employee of nationwide debt buyer CACH acknowledged that he signed affidavits in support of CACH lawsuits simply by comparing one line of data on a computer screen against the information contained in the lawsuit. The plaintiffs’ attorney asked the man, “So, if you see on the screen that the moon is made of green cheese, you trust that CACH has investigated that and has determined that in fact, the moon is made of green cheese.” He replied, “Yes.”¹²⁴

Critics and some law enforcement and regulatory officials call this “robo-signing,” the computerized mass production of affidavits that the affiant has no real evidentiary basis to believe are accurate.

Some debt buyers counter that none of this is any different than what happens when a bank, as original creditor, sues a consumer over a delinquent credit card debt. As one company official put it, “Is it any different, then, when a bank sues? ... The records coming out of the banks are computerized [too].”¹²⁵ To the extent that this comparison holds true, it does not necessarily tend to legitimize debt buyers’ affidavit practices. In July 2015, the CFPB, 47 state attorneys general, and the District of Columbia found that JP Morgan Chase had filed more than 528,000 debt collection lawsuits against consumers “often using robo-signed documents” and that the bank had “systematically failed to prepare, review and execute truthful statements as required by law.”¹²⁶

Similar allegations have targeted the law firms debt buyers retain to litigate their claims. The federal Fair Debt Collections Practices Act requires attorneys to subject collections

¹²³ Jessica Silver-Greenberg, “Dead Soul is a Debt Collector, Deceased Woman’s Name was Robo-Signed on Thousands of Affidavits,” *Wall Street Journal*, December 31, 2010, <http://www.wsj.com/articles/SB10001424052970204204004576049902142690400> (accessed October 26, 2015).

¹²⁴ David Segal, “Debt Collectors Face a Hazard: Writer’s Cramp,” *New York Times*, October 31, 2010, http://www.nytimes.com/2010/11/01/business/01debt.html?_r=0 (accessed October 9, 2015).

¹²⁵ DBA Interview, April 29, 2015

¹²⁶ CFPB, “CFPB, 47 States and D.C. Take Action Against JPMorgan Chase for Selling Bad Credit Card Debt and Robo-Signing Court Documents,” July 8, 2015, <http://www.consumerfinance.gov/newsroom/cfpb-47-states-and-d-c-take-action-against-jpmorgan-chase-for-selling-bad-credit-card-debt-and-robo-signing-court-documents/> (accessed October 9, 2015).

claims to “meaningful legal review” before filing them, but large collections firms have been accused of numerous lapses and abuses in debt buyer cases. For example:

- In 2014, the CFPB filed a federal lawsuit against a Georgia law firm that files hundreds of thousands of cases every year on behalf of banks, debt buyers, and other creditors. The CFPB suit alleged that one attorney at the firm had signed over 130,000 lawsuits during a two year period. It accused the firm of “operating a debt collection lawsuit mill that uses illegal tactics to intimidate consumers into paying debts they may not owe” and alleged that it “churns out hundreds of thousands of lawsuits that frequently rely on deceptive court filings and faulty or unsubstantiated evidence.”¹²⁷
- In 2012, a group of people sued by debt buyers sought class certification in federal court, alleging that they and 100,000 others were victims of “a scheme to fraudulently obtain default judgments against them” in debt buyer cases. In a ruling that granted class certification, the court described the affidavit signing practices of an attorney with leading New York collections law firm Mel S. Harris & Associates. The court noted that the attorney signed “hundreds of affidavits a week, purportedly based on personal knowledge, purporting to certify that the action has merit, without actually having reviewed any credit agreements, promissory notes, or underlying documents, and, indeed, without even reading what he was signing.”¹²⁸
- In 2014, a lawsuit against New Jersey’s largest collections law firm revealed that attorneys spent an average of just four seconds reviewing individual cases brought by debt buyers and other creditors before signing off on them. The firm was found in breach of the Fair Debt Collection Act’s requirement that collections lawsuits be subject to “meaningful attorney review” before being filed in court.¹²⁹

¹²⁷ CFPB, “CFPB Files Suit against Debt Collection Lawsuit Mill,” July 14, 2014, <http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-debt-collection-lawsuit-mill/> (accessed October 9, 2015).

¹²⁸ *Sykes v. Mel Harris & Associates, LLC*, 285 F.R.D. 279, 285 (S.D.N.Y. 2012), *aff’d sub nom. Sykes v. Mel S. Harris & Associates, LLC*, 780 f.3d 70 (2d Cir. 2015).

¹²⁹ Williams Cuker Berezofsky, LLC, “Federal Court Finds Pressler and Pressler’s Four-Second Debt-Collection Complaint Review to Violate FDCPA,” July 7, 2014, <https://consumerprotectionlawblog.wordpress.com/2014/07/07/federal-court-finds-pressler-and-presslers-four-second-debt-collection-complaint-review-to-violate-fdcpa/> (accessed October 9, 2015).

Sky-High Interest and Questionable Math

Debt buyers are legally entitled to continue accruing interest at contract rates on the debts they purchase up until they secure a court judgment.¹³⁰ Since most of the charged-off debt purchased by debt buyers is credit card debt—with rates of compound interest often pegged at well above 25 percent—the scale of a purchased debt can grow by vast proportions between the time it is purchased and the time a debt buyer files a lawsuit. One Maryland study found that debt buyers were able to increase the size of their judgments against consumers by 18.2 percent on average thanks to interest and attorney’s fees.¹³¹

As discussed above, these huge accumulations of interest can have devastating impacts on poor defendants, particularly because debt buyers often wait several years before filing a lawsuit.¹³² Yet many courts neither ask for nor receive any evidence that interest has been calculated correctly or honestly. As one legal aid attorney in Pontiac, Michigan put it, “The amount of the debt is an issue in *all* of the cases. Our clients say their credit card limit was \$500 or so—so how do they owe \$2,000? We have no idea where they get their numbers.”¹³³ Minnesota consumer rights attorney Randall Ryder complained that:

If you ever ask, ‘How are you charging 30 percent interest on this?’ they say, ‘Well, that’s what the paperwork says.’ And I say, ‘Oh, the paperwork that no one can authenticate? Is *that* the paperwork you’re talking about?’¹³⁴

In an interview, Human Rights Watch asked Michigan Judge William Richards whether he had confidence that the thousands of default judgments he had personally issued in favor of debt buyers were for the correct amount of money. He replied:

That’s [a] question that exposes the problem. I have no way of knowing. The data isn’t there in front of me ... the creditors just get whatever they asked

¹³⁰ Beyond this point, post-judgment rates of interest capped by state law apply. These are also often very high, however. See above, Runaway Interest and Costs.

¹³¹ Peter Holland, “Junk Justice: A Statistical Study of 4400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*, p. 208.

¹³² See above, Runaway Interest and Costs.

¹³³ Human Rights Watch interview with Kelly Bidelman, Managing Attorney, Legal Aid and Defender Association, Pontiac, MI, April 16, 2014.

¹³⁴ Human Rights Watch telephone interview with Randall Ryder, October 24, 2014.

for. It's a problem. A default judgment gives the case a kind of credibility, right? As though there had been some kind of screening of these cases and a finding that they are legitimate. But there is nothing like that.... If we are going to allow [debt buyers] to use the court to elevate the validity of their claimed debt by attaching a judgment to it, maybe we should make them provide some kind of proof that they are actually owed it.¹³⁵

As the text box below describes, Judge Richards's court made unusually vigorous efforts to confront some of these problems until the court was sued by a disgruntled debt buyer and forced to stop.

Suing A Court for Doing Its Job

Once a debt buyer secures a default judgment, it has access to legal remedies to help collect it. Many debt buyers seek to garnish the wages or bank accounts of the people they have secured judgments against. Their requests for garnishment are generally not subject to meaningful scrutiny by the courts any more than the original judgments were.

Several years ago the state district court in Southfield, Michigan began asking its clerks to scrutinize garnishment requests submitted by debt buyers to make sure they were free from errors. "My court administrator was clearly troubled by these cases," Judge William Richards told Human Rights Watch. "She saw some problems and really took it on herself to try and engender some reforms. Our court was more aggressive than most at screening requests for garnishment. At one point we were doing 9,000 garnishments per year and one clerk was screening all of them."¹³⁶

In 2005, the court returned numerous garnishment requests loaded with apparent mistakes to the attorney who had filed them on behalf of debt buyer Credit Acceptance Corporation. "He filed 60 or 70 garnishment requests in a single day," Judge Richards recalled. "There were thousands of dollars' worth of errors."¹³⁷ Some of the garnishment requests appeared to relate to judgments that were void or already satisfied while others appeared to include excessive interest. The court's clerk asked Credit Acceptance's attorney to correct errors and provide additional supporting documentation. Rather than accede to these requests, the attorney sued the court on behalf of his client. He argued that the court's clerks had no right to request additional documentation in support of his garnishment requests.¹³⁸

¹³⁵ Human Rights Watch interview with Judge William Richards, Southfield, MI, October 14, 2014.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ State of Michigan, Court of Appeals, In re Credit Acceptance Corporation, No. 262404,

After losing an initial hearing, Credit Acceptance prevailed in front of the Michigan Supreme Court. The court noted that, “We recognize that the defendant [court] has an understandable interest in the rights of judgment debtors and in protecting them from writs of garnishment that are baseless or inflated.” It also noted that, “Defendant may well be right in arguing that the procedures it employed are an efficient and fair way to provide additional protection to judgment debtors.” Nonetheless it found that the “simple response” to all of this was that court rules “do not allow those procedures.”¹³⁹

In the years since then, in Judge Williams’ words, “We screen them less aggressively.... I felt like you do—we’ve got to have some role here. We can’t just be rubber stamps.” But with his court administrator and clerks barred from taking the work on, he said, there is no practical way to apply meaningful scrutiny to the garnishment requests.¹⁴⁰

Corporate Plaintiffs in the “People’s Court”

Individual debt buyer lawsuits tend to involve relatively small amounts, typically just a few thousand dollars.¹⁴¹ One practical consequence of this is that in many states, debt buyers typically file suit in small claims courts or similar low-level venues. These courts often have very relaxed filing requirements and rules of evidence. The relatively informal nature of these courts is intended both to allow for the more efficient adjudication of small claims and to make the courts more accessible to ordinary people without lawyers. Indeed one key policy rationale for the very existence of small claims courts lies in “increasing the access of the poor to equal justice.”¹⁴²

When debt buyers and their lawyers use these venues to sue alleged debtors *en masse*, their relaxed filing requirements and rules of evidence can have the opposite of their intended effect: they sometimes exacerbate an already profound inequality of arms

Oakland Circuit Court, LC No. 2005-063349-AS, January 16, 2007, https://cases.justia.com/michigan/court-of-appeals-published/20070116_C262404_37_70.262404.OPN.COA.PDF (accessed January 11, 2016).

¹³⁹ *Ibid.*, p. 5.

¹⁴⁰ Human Rights Watch interview with Judge Gerald Williams, Surprise, AZ, July 21, 2014.

¹⁴¹ Human Rights Watch compiled randomized sample of 500 debt buyer lawsuits in New York. 247 of those cases had resulted in judgments at the time the sample was compiled, and the average amount of those judgments stood at \$3,973.56, with the median amount being \$2,458. Data on file with Human Rights Watch. A study conducted in Maryland found that the average principal amount sought by plaintiffs in a sample of 4,400 cases was \$2,993.17. Peter Holland, “Junk Justice: A Statistical Study of 4,400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*, pp. 206-209.

¹⁴² Eric H. Steele, “The Historical Context of Small Claims Courts,” *Law & Social Inquiry*, vol. 6, iss. 2, April 1981, pp. 293-376.

between the parties. Rules intended to make the courts more accessible to ordinary people simply make it easier for multibillion dollar corporations to secure judgments against unrepresented people in court, without having to clear meaningful procedural or evidentiary hurdles.¹⁴³

In Maryland, for example, the state Supreme Court has ruled that the informal nature of small claims court means that defendants cannot force a debt buyer attorney to produce witnesses and subject them to cross examination. In a passionate dissent to the majority opinion on that matter, Judge Robert McDonald argued that:

It is ironic that a trial process designed to allow unrepresented laypeople to find justice in the legal system ... [has] been transformed into a streamlined debt collection process under which a sophisticated institutional litigant avoids even the possibility that its evidence will be subject to testing by cross-examination.¹⁴⁴

Arizona's justice courts provide another good illustrative case. Their informal nature is underscored by the fact that the Justices of the Peace who preside over them are not required to have a legal education. The courts operate under relaxed rules of evidence and require would-be plaintiffs to file very little by way of formal evidence in support of their claims at the initial stage. Chief Judge Stephen McMurray of the justice courts in Maricopa County explained to Human Rights Watch that, "We are the people's court. We need to be user-friendly and accessible to the lay person. We need to keep it that way."¹⁴⁵ But in reality many of the court's litigants are not "lay people" but sophisticated debt buying corporations who sue tens of thousands of Arizona residents every year with the help of top-tier collections law firms.

In a 12-month period beginning in July 2013, a group of just 5 national debt buyers filed more than 21,000 new lawsuits in the justice courts of Maricopa County, which includes

¹⁴³ See Beth Healy, "Dignity faces a steamroller," *Boston Globe*, July 31, 2006, http://www.boston.com/news/special/spotlight_debt/part2/page1.html (accessed October 9, 2015).

¹⁴⁴ *Rainford G. Bartlett v. Portfolio Recovery Associates, LLC* and *James Townsend v. Midland Funding, LLC*, Court of Appeals of Maryland, Case No. 24-C-13-001323 (*Bartlett*) and Case No. 24-C-13-001033 (*Townsend*), Opinion by Judge McDonald, May 19, 2014, <http://www.mdcourts.gov/opinions/coa/2014/64a13.pdf> (accessed October 9, 2015), p. 11.

¹⁴⁵ Human Rights Watch interview with Presiding Judge Stephen McMurray, Phoenix, AZ, July 22, 2014.

the city of Phoenix. Thousands of additional cases were filed by smaller debt buyers in Maricopa County during the same period.¹⁴⁶ Under the court's relaxed rules of evidence, these litigious corporate plaintiffs can easily secure default judgments without submitting their cases to any kind of meaningful judicial scrutiny.

In some cases, the rules governing some low-level courts arguably preclude judges from demanding the kind of evidence that would allow them to test the merits of uncontested debt buyer cases. Judge McMurray told Human Rights Watch that he expected debt buyers to include, when filing suit, at least a copy of a billing statement from the original creditor that seems to indicate that the debt at issue is real and that the plaintiff is suing the right person for the right amount of money. "Would I refuse a default without billing statements?" he asked. "Probably. Does the law allow that? I'm not sure."¹⁴⁷

¹⁴⁶ Data provided by Maricopa County justice courts upon request, and on file with Human Rights Watch. The five national debt buyers referred to were Asset Acceptance, LVNV, Midland Funding, Portfolio Recovery Associates, and Unifund. Those five filed a total of 22,211 cases.

¹⁴⁷ Human Rights Watch interview with Judge Stephen McMurray, Phoenix, AZ, July 22, 2014.

Thrown to the Wolves: Unrepresented Defendants in Court

We're watching a fight between two players, one a skilled repeat gladiator, and one who's thrown into the ring for the first time and gets clubbed over the head before they even get a sense of what the rules are.¹⁴⁸

— Elizabeth Warren

In principle, the evidentiary problems described above mean that defendants who appear in court to defend themselves against debt buyer lawsuits often stand a reasonable chance at winning. Some media reports have popularized the notion that ordinary people can easily win debt buyer lawsuits on their own simply by appearing in court and uttering what one National Public Radio segment referred to as a simple set of “magic words,” essentially, “show me the evidence.”¹⁴⁹

Reality is generally far less positive from a defendant's perspective. While defendants with competent legal representation often fare quite well in debt buyer cases, there is usually no easy path to victory for unrepresented litigants.¹⁵⁰ Viable defenses to debt buyer lawsuits can be quite difficult for a layperson to articulate and deploy effectively in front of a skeptical judge.

Unrepresented defendants often come to court with virtually no understanding of the law, their rights, or of what a debt buyer should have to prove in court in order to prevail against them. Debt buyers, on the other hand, tend to be represented by top-tier collections law firms or experienced in-house counsel.¹⁵¹ Many judges bind themselves with overly rigid notions of judicial neutrality that prevent rigorous examination of plaintiffs' claims when defendants lack the capacity to do it on their own. And all too often, courts not only fail to

¹⁴⁸ The Boston Globe Spotlight Team, “Debtors’ Hell, No mercy for consumers: Firms’ tactics are one mark of system that penalizes those who owe,” *Boston Globe*, July 30, 2006, http://www.boston.com/news/specials/debt/part1_main (accessed January 10, 2016).

¹⁴⁹ Jake Halpern, “Magic Words,” *This American Life*, August 15, 2014, <http://www.thisamericanlife.org/radio-archives/episode/532/magic-words> (accessed October 9, 2015).

¹⁵⁰ See below, The Importance of Legal Representation and Advice.

¹⁵¹ In New York, for instance, some leading debt buyers retain Cohen Slamowitz, a firm that represents debt buyers, banks, and other plaintiffs in more than 20,000 consumer credit cases every year. Unrepresented defendants in these cases may find themselves opposite an adversary who has litigated hundreds or even thousands of cases before that very court.

address the inequality of arms inherent to many debt buyer cases, but approach the cases in a way that greatly exacerbates the problem.

Pushing Defendants into Coercive and Unequal “Negotiations”

Many courts deliberately and actively push the parties in low-level civil cases to try and reach settlements right up until the last possible minute. At the time of a scheduled hearing many judges ask or encourage the parties to step outside the courtroom and make one last effort to reach an accord. In low-level cases involving equally matched parties, all of this makes perfect sense. Resolving cases amicably saves time and resources in courts that are often overwhelmed by crowded civil dockets.

This broader phenomenon of informal “hallway conferences” seems to be extremely common in debt buyer cases. The president of the Michigan Creditors Bar Association told Human Rights Watch that they are “sort of a time honored way to resolve matters” and that “going in the hallway is meant to be a kind of disarming experience, a more informal experience. The defendant might not have any defense and what’s going to happen is what’s going to happen.”¹⁵² But in debt buyer cases where the defendants lack legal representation these “informal” discussions can take on a sinister and potentially abusive character.

Unsupervised “negotiations” between the parties often push defendants into settling without knowing whether their adversary can actually prove their case, or even whether they have been sued over a legally enforceable debt or for the correct amount. And as one key study of debt buyer lawsuits in Maryland put it, “contact between debt-collecting attorneys and unrepresented defendants provides collecting attorneys with an opportunity to push defendants to settle on terms they do not understand and cannot afford.”¹⁵³

Unsupervised negotiations between debt buyer attorneys and unrepresented defendants can be deceptive and coercive. Many begin with plaintiffs’ attorneys walking into court just before a scheduled hearing and summoning a defendant to come and speak with him or

¹⁵² Human Rights Watch telephone interview Rob Warner and DBA officials, June 12, 2015.

¹⁵³ Peter Holland, “Junk Justice: A Statistical Study of 4400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*, p. 226.

her in the corridor. Often, they end minutes later with defendants who had come to court intending to fight the case against them agreeing to pay the plaintiff everything they asked for, and believing that they had no real choice.

In the lobby of the district court in Pontiac, Michigan, a Human Rights Watch researcher observed a debt buyer attorney speaking to an unrepresented defendant who he had plucked out of court minutes before her scheduled hearing. He told her that she had no choice but to pay his client the full amount she allegedly owed and that the only real issue was how much time he was willing to give her to satisfy the debt. “Well, the numbers are the numbers,” he told her. “And even at \$30 a month that’s going to take you 5 years to pay this.” The defendant agreed to acknowledge the debt and enter into a binding payment plan. When the parties returned to the courtroom, the debt buyer attorney explained the terms of the agreement to the judge, the defendant acknowledged that she had agreed to them, and they were entered as a judgment.¹⁵⁴

An hour later, the defendant in that case told Human Rights Watch that she agreed that she had unpaid debt but believed the debt buyer was suing her for a highly exaggerated sum. At no point had the court explained to her that the burden of proof was on the debt buyer, rather than on her, to prove the correct amount. She told Human Rights Watch that she felt she had no choice but to agree to pay the full amount alleged in the complaint because she couldn’t prove that it was incorrect. “I mean, I don’t have all my information together,” she said, “so I guess there’s nothing I can say about that.”¹⁵⁵

There is often little to deter unethical lawyers from behaving in an abusive or deceptive manner since court officials do not witness these interactions. In Detroit’s 36th district court, Human Rights Watch followed one pair of litigants—an unrepresented woman and an attorney from a large collections firm—into the corridor after the judge asked them to step outside and see whether they could come to an agreement. Once outside, the attorney turned to the defendant and grossly misrepresented what the judge had actually said: “Ma’am, you heard what the judge said. Just tell me what you can pay and we’ll do it

¹⁵⁴ Human Rights Watch court observation, 50th District Court, Pontiac, MI, October 15, 2014.

¹⁵⁵ Human Rights Watch interview with defendant (name withheld), 50th district court, Pontiac, MI, October 15, 2014.

so no further action is taken against you. But I can't go much lower than \$50 a month, I'll tell you that."¹⁵⁶

Minutes later, the defendant went back into court and agreed to pay the debt buyer everything he had asked for. Over the course of the next hour several other debt buyer cases were resolved the same way, with the judge entering judgments without ever asking defendants what transpired during the "discussions" that gave rise to them.¹⁵⁷

These interactions also underscore a troubling dynamic at play in some of these "hallway conferences." As New York consumer rights attorney Carolyn Coffey put it, "People are often confused as to who the creditor's attorney is, because they walk around like they are at home. People often think they are part of the court system and rely on their so-called advice to go and settle."¹⁵⁸

In another case in Detroit's 36th District Court, Human Rights Watch saw a debt buyer attorney persuade a woman to drop her objection to a wage garnishment a debt buyer had obtained against her. She told the attorney that she had filed the objection with help and advice from the court clerk's office. "Look, Miss," the attorney said. "You're not an attorney. I'm not saying you're dumb, but—look, the judge isn't going to agree to that. Let me tell you what we should do." Less than five minutes later she went back into the courtroom, dropped her objection, and agreed to a payment plan.

Later, in the corridor, Human Rights Watch asked that woman for her perspective on what had happened. She said, "He was like, 'You shouldn't have gone for the objection to garnishment.' I guess that man downstairs [in the court clerk's office] got me filed the wrong way. That clerk must have told me the wrong thing." She claimed that she had never received any notice of the suit against her and so did not have any opportunity to defend against it. She seemed not to understand that the plaintiff's attorney was not there to give her good, unbiased legal advice.¹⁵⁹

¹⁵⁶ Human Rights Watch court observation, 36th District Court, Detroit, MI, April 16, 2014.

¹⁵⁷ Ibid.

¹⁵⁸ Human Rights Watch email correspondence with Carolyn Coffey, August 27, 2015.

¹⁵⁹ Human Rights Watch interview with defendant (name withheld), 36th District Court, Detroit, MI, April 16, 2014.

During a hearing observed by Human Rights Watch in Upper Marlboro, Maryland, a judge sent one defendant out into the hallway to talk to a debt buyer attorney. She did not explain to the defendant who the attorney was, what they were meant to discuss, or whether she was obliged to enter into that conversation. Five minutes later the defendant stormed back into the courtroom, apparently outraged. When she and her adversary were called back in front of the judge she told the court that she had assumed that the court had assigned the man to represent her, and that she had confided in him and asked for his advice on how to proceed. She said she had been shocked when he responded by trying to persuade her drop her defense and pay his client.¹⁶⁰

Human Rights Watch interviewed several people who were drawn into these negotiations and said they did not realize that they were not required to reach an agreement with plaintiffs' attorneys, or even agree to negotiate with them. One New York attorney who volunteers for a program that provides free legal advice to defendants in debt buyer cases told Human Rights Watch, "The first thing I tell everyone is, 'do *not* go out in to the hallway with these people.'"¹⁶¹ In many courts, defendants do not have access to that simple and very important piece of advice.

"Judgeless Courtrooms"

Some courts have taken these "hallway conferences" to a disturbing extreme, cloaking them in the trappings of judicial process while leaving their unregulated and potentially abusive nature intact. These courts summon defendants to pre-trial proceedings that have no purpose other than to force them to sit down and talk to debt buyer attorneys. These are not arbitration hearings. The discussions take place in the absence of any supervision by court personnel or neutral mediator. Some courts refer to these proceedings as "resolution conferences." Many consumer rights advocates and attorneys deride them as "rocket dockets" or "judgeless courtrooms."

Some courts have gone so far as to let debt buyer attorneys take over a courtroom and run these proceedings themselves, with the assistance of court personnel but without any judicial intervention or oversight. As described below, Human Rights Watch observed such

¹⁶⁰ Human Rights Watch court observation, district court, Upper Marlboro, MD, May 22, 2014.

¹⁶¹ Human Rights Watch interview with Bronx Civil Legal Advice and Resource Office (CLARO) volunteer attorney (name withheld), Bronx, NY, February 5, 2015.

proceedings in the district court in Upper Marlboro, Maryland and in Philadelphia’s municipal court. We have also received reports of similar proceedings in courts in Texas, Georgia, and Tennessee.¹⁶² In our view, this approach to resolving debt buyer lawsuits is inherently abusive. In a very literal sense, it allows debt buyers to commandeer the machinery and coercive power of the court in service of their claims.

Philadelphia’s “Judgeless Courtroom”

On a typical afternoon in courtroom 5 of Philadelphia’s Municipal Court, more than 120 alleged debtors were summoned to appear in court. The majority were being sued by debt buyers. None of the 20 or so defendants who appeared had lawyers.

The first people to arrive—a tired-looking mother pushing a baby stroller and a woman who came limping down the corridor with a walker—looked confused. They were a few minutes late, but the courtroom was empty aside from five men in suits chatting at the front of the room. These were the attorneys for the debt buyers, and some of them had thirty or more cases on the docket that day. The attorneys brusquely directed the arriving defendants to a sign-in sheet and told them to sit down and wait.

Eventually another man in a shirt and tie entered the room. He shook hands and exchanged pleasantries with the plaintiffs’ attorneys, then busied himself putting a sheaf of new paper into the printer and loading paper cups into the water cooler. He was a trial commissioner, the only employee of the court in the room and the person nominally in charge of these proceedings. At no point during the afternoon did he introduce himself to the defendants in the room, explain why they were there, or tell them that they had a right to a hearing in front of a judge if they wanted one. In fact, he did not address the room at all.

The attorneys began working their way down the sign-in sheet, taking the defendants one-by-one into a small meeting room at the back of the court, out of the trial commissioner’s earshot. From the corridor outside the courtroom it was possible to listen in on some of these conversations. “You have been summoned here because you owe a debt that you failed to repay,” one debt buyer attorney sternly admonished an elderly man. “You can have a trial if you want one but believe me, it will be better for you if you just agree to a payment plan with me right now.” The man stammered that he did once have the credit card at issue in the case, but that the amount of the alleged debt struck him as impossibly high. “It’s called compound interest,” the attorney replied acidly. He produced no evidence in support of his

¹⁶² Email correspondence and telephone interviews with consumer rights attorneys (names withheld), August and September 2015. See also, Jessica Silver-Greenberg, “In Debt Collecting, Location Matters,” *Wall Street Journal*, July 18, 2011, <http://www.wsj.com/articles/SB10001424052702303365804576433763597389214> (accessed October 28, 2015).

claim. The defendant agreed to pay the full amount he allegedly owed, in installments of \$50 per month.¹⁶³

No one gets a trial unless they make it through this gauntlet unscathed. As one Pennsylvania defense attorney complained, for all practical purposes the court is allowing debt buyers to “just use the court as one of their collection tools.”¹⁶⁴

The trial commissioner on duty the day Human Rights Watch attended these proceedings said that defendants wind up agreeing to pay the plaintiffs about 80 percent of the time. While the plaintiffs’ attorneys busied themselves trying to pry payment agreements out of their defendants, the trial commissioner sat quietly at the front of the room entering default judgments against more than 100 people who had failed to appear.¹⁶⁵

In September 2015, the municipal court started a pilot program that allows defendants summoned to these proceedings to access independent legal advice and representation provided by volunteer attorneys. Initially limited in scope to just 30 defendants once per month—a tiny fraction of the total—the program could mark a responsible step forward if it is ultimately ramped up and expanded to bolster the rights of all defendants. This, however, would require a significant commitment of public resources.¹⁶⁶

In Maryland’s Prince George’s County, the district court has attracted controversy for this practice.¹⁶⁷ Several times a month, the court summons defendants *en masse* to courtrooms that no judge presides over. A judge initiates the proceedings, explains to defendants why they are there, and informs them that they are entitled to a hearing if they want one.¹⁶⁸ Once the proceedings are underway, though, the judge leaves the room.

At this point, plaintiffs’ attorneys call defendants forward one at a time to tables set up inside the courtroom and attempt to persuade them to agree to pay the plaintiffs’ claims.

¹⁶³ Human Rights Watch court observation, Philadelphia Municipal Court, February 4, 2015.

¹⁶⁴ Human Rights Watch interview with defense attorney (name and location withheld), December 18, 2014.

¹⁶⁵ Human Rights Watch court observation, Philadelphia Municipal Court, February 4, 2015.

¹⁶⁶ Human Rights Watch telephone interview with attorney (name and location withheld), October 28, 2015. Human Rights Watch requested comment from Supervising Judge Bradley Moss. However, after initially expressing willingness to respond to written questions, Judge Moss failed to reply to our correspondence or to acknowledge multiple follow-up emails and phone calls. Letter and email correspondence on file with Human Rights Watch.

¹⁶⁷ Maria Aspan, “Courthouse ‘Rocket Dockets’ Give Debt Collectors Edge over Debtors,” *American Banker*, February 11, 2014, http://www.americanbanker.com/issues/179_29/rocket-dockets-judge-less-courts-give-debt-collectors-edge-over-debtors-1065545-1.html?zkPrintable=1&nopagination=1 (accessed October 9, 2015).

¹⁶⁸ This had not been the case in the past, and seems to represent a reform undertaken following publication of the *American Banker* expose cited above.

No court official supervises or monitors these interactions.¹⁶⁹ As a 2014 *American Banker* report noted, “at first glance these sessions resemble legally mandated mediation: they take place in courtrooms and are administered by clerks and uniformed bailiffs ... what’s missing is a judge or other neutral moderator.”¹⁷⁰ If defendants fail to appear, their case usually ends with a default judgment in favor of the debt buyer.¹⁷¹ As of 2015, observers reported to Human Rights Watch that the court had coordinated to provide free legal advice to at least some defendants in collections cases.¹⁷²

Their Day in Court: Representational Inequality and “Cattle Calls”

Some judges—even those who handle large volumes of debt buyer litigation—seem unaware of the evidentiary and other problems that have plagued debt buyer cases. Karen Meyers, then-New Mexico’s assistant attorney general for consumer protection, told Human Rights Watch, “Nobody looks underneath the rock. Because many judges don’t know how this all works there are no red flags for them.”¹⁷³ One Michigan judge, speaking on condition of anonymity, told Human Rights Watch that, “I don’t think this is even on the radar screens of my colleagues as something that’s a real issue. They don’t see it.”¹⁷⁴

This means that instead of seeing debt buyer lawsuits for what they are—cases that merit proactive scrutiny to ensure the courts don’t unwittingly trample the rights of poor defendants—many judges treat them like any other civil case between two equal parties. If an alleged debtor fails to mount an effective defense, many judges do not see that they have any particular responsibility to probe the plaintiff’s case for signs of error or abuse.

In court, unrepresented defendants tend to be wildly outmatched by the experienced collections attorneys squared off against them. The central problem facing these litigants is that many simply do not know how to articulate a valid defense to the debt they are being sued for. Neither do they know how to probe the evidentiary weaknesses that

¹⁶⁹ Human Rights Watch court observations, district court, Upper Marlboro, MD, July 11, 2014 and August 7, 2015.

¹⁷⁰ Maria Aspan, “Courthouse ‘Rocket Dockets’ Give Debt Collectors Edge over Debtors,” *American Banker*.

¹⁷¹ Peter Holland, “Junk Justice: A Statistical Study of 4400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*, p. 196.

¹⁷² Human Rights Watch email correspondence with Emanwel Turnbull, October 29, 2015.

¹⁷³ Human Rights Watch telephone interview with Karen Meyers, June 25, 2014.

¹⁷⁴ Human Rights Watch interview with district judge (name withheld), Michigan, October 16, 2015.

characterize many debt buyer lawsuits. And it is unrealistic to expect that an average person would.

As Minnesota attorney Randall Ryder explained to Human Rights Watch, “most times a consumer ... is not going to say, ‘Yes, I opened that account but I have no idea whether the balance is correct or who this company is or whether they really own the debt.’ They don’t know how to make these arguments.”¹⁷⁵ Kansas City attorney Dale Irwin referred to unrepresented defendants in debt buyer cases as “meat for the grinder.”¹⁷⁶

One afternoon in Detroit’s busy 36th District Court, Human Rights Watch saw a series of unrepresented litigants try to bring motions objecting to the garnishment of their wages by a debt buyer. Each in turn stammered through a lengthy and legally irrelevant narrative about their economic difficulties and their confusion about the provenance and size of the underlying debt. And in each case the judge’s only intervention was to intone flatly, “You have failed to put forward a legally valid objection to the garnishment,” before denying the application and moving on to the next case.¹⁷⁷

Several judges told Human Rights Watch that while they are well aware of the evidentiary and other problems plaguing debt buyer lawsuits, they were uncomfortable pressing debt buyer attorneys to prove their cases when defendants did not know how to do it themselves. One justice of the peace in Arizona said he was reticent to “invent” defenses for people who failed to bring them forward on their own. He worried that it would be inappropriate to push debt buyer plaintiffs harder than unrepresented defendants managed to do on their own.

In Human Rights Watch’s view, this reflects an unnecessarily rigid and shallow view of judicial neutrality and effectively shifts the burden of proof on to a defendant. Given how common abuse, error, and evidentiary failings have been in debt buyer litigation, judges should not hesitate to require debt buyer plaintiffs to prove their case to the court’s satisfaction before handing down a judgment. As New York Chief Judge Jonathan Lippman put it to Human Rights Watch:

¹⁷⁵ Human Rights Watch telephone interview with Randall Ryder, October 24, 2014.

¹⁷⁶ Human Rights Watch telephone interview with Dale Irwin, December 4, 2014.

¹⁷⁷ Human Rights Watch court observation, 36th District Court, Detroit, MI, October 9, 2014.

It's well within the judge's appropriate role to make sure justice is done. There is a basic duty of neutrality but you have to ensure a level playing field—you have to ensure that justice really is blind.... It's hard to draw the line but we don't live in a world where we should live so narrowly that you allow injustice to unfold in front of your eyes and do nothing.... Our role is not to sit in our chambers or on the bench and just look at the four corners of the case in front of us. Our role is not to feather anyone's nest. Our role is to be a judiciary whose goal is to make the principle of equal justice a reality. A passive judiciary is one that invariably does not meet its constitutional mission.¹⁷⁸

Overcrowded dockets compound the problems facing unrepresented defendants by creating powerful institutional incentives to quickly dispose of cases instead of methodically probing them for signs of error or abuse. Echoing a common refrain, one Florida attorney complained to Human Rights Watch that some judges “are just overworked because our judiciary is underfunded, and are just trying to get through the day and the pile of cases that they have and they are not taking too much care with each litigant.”¹⁷⁹

The Importance of Legal Representation and Advice

The vast majority of defendants in debt buyer lawsuits do not have legal representation, often because they cannot afford it. One study examined a sample of 4,400 debt buyer lawsuits in Maryland and found that less than 2 percent of defendants had legal representation.¹⁸⁰ A 2010 study found that less than one percent of people sued by debt buyers in New York City were represented by an attorney.¹⁸¹ With the assistance of the New York state court system, Human Rights Watch compiled a randomized sample of 500 lawsuits debt buyers filed in courts across New York State in 2013. Two hundred forty-seven of those cases had resulted in a judgment by the time the data was sampled and the

¹⁷⁸ Human Rights Watch interview with Chief Judge Jonathan Lippman, New York City, November 13, 2014.

¹⁷⁹ Human Rights Watch telephone interview with Alice Vickers, Florida Consumer Action Network, December 2, 2014.

¹⁸⁰ Peter Holland, “Junk Justice: A Statistical Study of 4400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*, pp. 206-210.

¹⁸¹ New Economy Project, “Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers,” p. 1. Across a statistical sample of 365 debt buyer cases in the same study, not a single defendant was represented by an attorney. *Ibid.*

defendants had legal representation in only three of those cases.¹⁸² As one Arkansas woman put it to Human Rights Watch, “I called several lawyers and they wanted \$200 just to talk to them. I said, ‘Well, if I had that kind of money I could just pay the bill.’”¹⁸³

The limited available evidence seems to indicate that defendants with legal representation often fare reasonably well against debt buyers in court.¹⁸⁴ Legal aid and consumer rights attorneys across several states told Human Rights Watch that they win the overwhelming majority of the cases they defend against debt buyers.¹⁸⁵ Some attorneys reported that if they advanced a vigorous defense, debt buyers often simply dropped the case. This might reflect plaintiffs’ uncertainty about their ability to prevail at trial, or a simple calculation about the time and resources they are willing to invest litigating a relatively small debt.

When Human Rights Watch asked a legal aid attorney in Pontiac, Michigan whether her office had ever lost a trial in a debt buyer case, she replied, “I can’t remember any. We find the junk debt buyers often do not have any appropriate proof, they come to trial with no witnesses or documentation so they just give up when they get to the end.”¹⁸⁶

In some cases, judges may simply be more inclined to take a defendant seriously if they are represented by an attorney. Steven McMurray, chief judge of the justice courts in Maricopa County, Arizona told Human Rights Watch, “If the person shows up with a competent attorney, this case is not getting resolved in five minutes,” he said. “That person [the attorney] is here for a reason. Justices of the Peace are used to processing cases fast and efficiently but if an attorney shows up we pull it off that greased rail process.”¹⁸⁷ Unfortunately, the vast majority of defendants in debt buyer cases do not have legal representation and, in many courts, are stuck on precisely the kind of “greased rail process” Judge McMurray alluded to.

¹⁸² Data on file with Human Rights Watch.

¹⁸³ Human Rights Watch telephone interview with Carolyn Farahee, March 10, 2015.

¹⁸⁴ Peter Holland, “Junk Justice: A Statistical Study of 4400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*, pp. 224-234. The paper studied a sample of debt buyer lawsuits filed in Maryland. Only two percent of defendants in those cases had legal representation. Those defendants managed to have the case against them dismissed about 70 percent of the time.

¹⁸⁵ Human Rights Watch interviews with attorneys in Michigan, Maryland, New York, and Pennsylvania, 2014 and 2015; Human Rights Watch telephone interviews with attorneys in Minnesota, Florida, Missouri, Arkansas, and North Carolina, 2014 and 2015.

¹⁸⁶ Human Rights Watch interview with Kelly Bidelman, Managing Attorney, Legal Aid and Defender Association, Pontiac, MI, April 16, 2014.

¹⁸⁷ Human Rights Watch interview with Judge Stephen McMurray, Phoenix, AZ, July 22, 2014.

Recommendations for Governments, Courts, and Debt Buyers

The following pages explain the rationale for, and possible impact of, Human Rights Watch's core recommendations to policymakers at all levels. A more comprehensive list of recommendations follows at the end of this report.

The US federal government has begun taking some useful steps towards better regulation of the debt buying industry. Regulators have put increasing pressure on banks to restrict the sale of charged-off debt to buyers who have some capacity to collect and litigate responsibly, and to restrict debt buyers' ability to re-sell debt on to other firms.¹⁸⁸ The Consumer Financial Protection Bureau is engaged in a lengthy rulemaking process squarely aimed at better regulation of debt buyers and other debt collectors. All of these steps are welcome and hold some promise for better protection of alleged debtors.

That said, the federal government has little power to change the behavior of the state court systems that adjudicate debt buyer cases, and it therefore has little capacity to address many of the problems described in this report. There is an urgent need for state governments and court systems to take action themselves. Because of the relative lack of progress at this level in most states, this is where most of our recommendations are targeted. In addition to the steps below, there is a clear need for reform of the broader legal framework governing debt collection lawsuits in the vast majority of US states. The National Consumer Law Center's Model Family Financial Protection Act includes concrete legislative language that could address many of the most salient issues.¹⁸⁹

No More Rubber Stamp Default Judgments

Human Rights Watch believes that regardless of whether alleged debtors respond to or attempt to defend against debt buyer lawsuits, courts should apply meaningful, proactive scrutiny to those suits before awarding default judgments to the plaintiffs. At minimum,

¹⁸⁸ See Office of the Comptroller of the Currency, US Department of the Treasury, "Risk Management Guidance," August 4, 2014, <http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html> (accessed October 26, 2015).

¹⁸⁹ Robert J. Hobbs and Chi Chi Wu, "Model Family Financial Protection Act," National Consumer Law Center, October 2013, http://www.nclc.org/images/pdf/debt_collection/model_family_financial_protection_act.pdf (accessed October 26, 2015).

before issuing a default judgment in favor of a debt buyer courts should require plaintiffs to submit supporting documentation that tends to reliably indicate that:

- The plaintiff owns the debt at issue;
- The defendant owes the debt at issue;
- The lawsuit is not time-barred;
- The amount of the alleged debt along with any post-sale interest has been correctly calculated;
- The contracts governing the initial sale as well as any subsequent sales of the debt contain all the warranties of accuracy and legality described under DBA International's certification standard for debt buyers; and that
- The defendant in the case was properly served with notice of the suit against them.

A handful of states have already taken steps in this area that can serve as a useful model for others. In 2014 the New York state court system adopted rules that impose enhanced filing requirements on debt buyer plaintiffs. New York's rules require evidence of all of the points highlighted just above.¹⁹⁰ However, because the rules only apply to debts purchased after their entry into force, it will take time to evaluate the extent and nature of their impact. At least two other states—California and North Carolina—have adopted similar rules through court action or legislation. Consumer attorneys in North Carolina believe that the new rules there have led to a drop in the volume of debt buyer lawsuits and that those that are being filed are less prone to error and abuse.¹⁹¹ As of May 2015, legislatures in Maine, Oregon, Washington State, and Illinois were reportedly considering similar measures, as was the District of Columbia.¹⁹²

Maryland has also been a “particularly active regulator” in this area. The chief judge of the state's district court has dismissed more than 20,000 debt buyer lawsuits since 2010. In 2012, the state adopted comprehensive new rules that raise the evidentiary bar debt buyers must clear in order to obtain default judgments.¹⁹³

¹⁹⁰ New York State Unified Court System, “New Consumer Credit Rules and Resources,” 2015, <https://www.nycourts.gov/rules/ccr/> (accessed October 9, 2015).

¹⁹¹ Human Rights Watch telephone interview with Carlene McNulty, senior attorney, NC Justice, August 18, 2015.

¹⁹² Tim Bauer, “Proposed Legislation in Numerous States Would Negatively Impact the Collection Industry,” *insideARM*, May 21, 2015, <http://www.insidearm.com/daily/debt-collection-news/accounts-receivables-management/proposed-legislation-in-numerous-states-would-negatively-impact-the-collection-industry/> (accessed October 9, 2015).

¹⁹³ Peter Holland, “Junk Justice: A Statistical Study of 4400 Lawsuits Filed by Debt Buyers,” *Loyola Consumer Law Review*, pp. 198-199.

All of this signals a promising trend, but one whose longevity and scope remain uncertain. The large majority of states have done nothing. A few states—Arkansas, Arizona, and Tennessee—have moved in the wrong direction, passing laws that effectively force the courts to treat unsubstantiated electronic records produced by debt buyers as sufficient evidence to trigger a default judgment.¹⁹⁴

In an April 2015 meeting with representatives of DBA international and several leading debt buyers, those present indicated to Human Rights Watch that they were not averse to stricter filing requirements so long as the rules were rational and fair. As one company representative put it:

If the courts required us to submit documentation of warranties as part of filing requirements, for example, we would just do it—it would be simple for us. We are not going to be the ones running around telling the courts to require that of us, but we wouldn't have a problem with it, either.¹⁹⁵

Some advocates question the sincerity of these assertions. Lisa Stifler of the Center for Responsible Lending told Human Rights Watch that, “Not only are debt buyers actively opposing meaningful reforms, but they have also supported sham reforms that codify bad practices.”¹⁹⁶ In Oregon, DBA International and Encore Capital spent more than \$64,000 collectively in 2015 lobbying against legislation that advocates said would have brought significant consumer protections to the state.¹⁹⁷ Encore Capital also reportedly lobbied unsuccessfully to water down North Carolina's efforts to protect the rights of defendants in debt buyer cases, for example.¹⁹⁸ Political resistance could also be stiff from individual

¹⁹⁴ Ariz. Rev. Stat. Ann. §§ 44-7804, 44-7805 (2013); 2013 Tenn. Laws Pub. Ch. 186 (S.B. 224) (2013); 2013 Ark. Laws Act 1495 (H.B. 2028) (2013). See also Lisa Stifler and Leslie Parrish, “Debt Collection and Debt Buying: The State of Lending in America and its Impact on US Households,” Center for Responsible Lending, April 24, <http://www.responsiblelending.org/state-of-lending/reports/11-Debt-Collection.pdf> (accessed October 9, 2015), fn. 31, noting that, “The Tennessee bill that was originally filed was identical to the law that passed in Arkansas, and both the Tennessee and Arkansas bills used the Arizona bill as a template.”

¹⁹⁵ DBA Interview, April 29, 2015.

¹⁹⁶ Human Rights Watch email correspondence with Lisa Stifler, Senior Policy Counsel, Center for Responsible Lending, October 28, 2015.

¹⁹⁷ Ibid. See also Oregon Government Ethics Commission, “Public Records, Lobbying Client/Employer Expenditures,” http://www.oregon.gov/ogec/pages/public_records.aspx (accessed January 10, 2016).

¹⁹⁸ See Gary Robertson, “Consumer Advocates Worry about Changes to NC Debt Collection,” Associated Press, April 29, 2015, <http://www.citizen-times.com/story/news/2015/04/28/consumer-advocates-worry-changes-nc-debt-collection/26534505/> (accessed October 28, 2015).

states' creditor bars. Still, the apparent lack of any unified public opposition to reform on the part of debt buyers themselves makes most states' failure to act in this arena that much more inexplicable.

Enhanced filing requirements and expectations of judicial scrutiny could admittedly slow down the administration of justice in courts that are already struggling with overcrowded dockets. But as one CFPB official put it, "That's not something the consumers should have to pay for, or give up their rights to accommodate.... If it were a consumer trying to get a default judgment against one of these companies, you can bet the court would ask questions."¹⁹⁹ Still, courts and state legislators concerned about the smooth and efficient administration of justice may need to give careful thought to how court clerks can be mandated—and also empowered—to impose meaningful front-line scrutiny to debt buyer case filings and call potential problems to the attention of judges.

Protect Defendants from Coercive “Negotiations” with Debt Buyer Attorneys

Courts should not require or encourage unrepresented defendants to enter into unsupervised negotiations with debt buyer attorneys on court premises. State legislatures should enact legislation to prohibit debt buyer attorneys from engaging in unsupervised discussions with unrepresented defendants on court premises unless a judge, neutral mediator, or other designated officer of the court is present. In the absence of such legislation, court systems should adopt rules to this effect on their own to the extent applicable state law permits it. “Judgeless courtroom” proceedings like those Human Rights Watch observed in Maryland and Philadelphia should be eliminated or fundamentally restructured so that they are mediated by court personnel or a neutral mediator appointed by the court, while also ensuring that defendants have access to independent pro bono legal representation or advice.

Level the Playing Field with Free Legal Assistance

The inability of poor people to secure legal representation—or even legal advice—in debt, housing, and other civil cases is a profoundly important structural problem across the US

¹⁹⁹ Human Rights Watch telephone interview with Jean Healey, senior counsel for enforcement strategy, CFPB; and CFPB enforcement attorneys Tom Ward, Greg Noffler, and Molly McOwen, August 13, 2014.

court system.²⁰⁰ At minimum, courts and state governments should take broad-based action to expand access to legal services and pro bono legal advice for low-income litigants in consumer credit cases.

In many jurisdictions it is not realistic to think that all or even most low-income defendants in consumer credit cases will be able to access free legal representation. But experience shows that good results can be achieved simply by helping unrepresented defendants secure independent legal advice.²⁰¹

In New York City, a program called Bronx CLARO provides pro-bono legal advice to unrepresented defendants in consumer credit cases filed in court in the Bronx.²⁰² CLARO estimates that it provided services to 2,000 unique individuals in 2014. More than half of those cases (1,253) were consumer debt cases and 55 percent of those were debt buyer cases. CLARO volunteers helped defendants identify and raise a variety of defenses in hundreds of those cases.²⁰³ The demand for these services is overwhelming. A Human Rights Watch researcher observed more than 100 people waiting to speak with CLARO volunteers on a typical afternoon in the Bronx courthouse.²⁰⁴ The New York court system does not fund or otherwise directly support CLARO, but it provides the initiative with space in the courthouse to meet with defendants.

Similar initiatives exist in some courts across the country, but in an uneven patchwork that often depends largely on the interest and commitment of individual judges. Experience shows that courts can achieve important results with relatively minimal effort. In Michigan, for instance, Judge Charles Goedert of the state's 43rd District Court launched a very simple

²⁰⁰ See Erik Eckholm and Ian Lovett, "A Push for Legal Aid in Civil Cases Finds Its Advocates," *New York Times*, November 21, 2014, http://www.nytimes.com/2014/11/22/us/a-push-for-legal-aid-in-civil-cases-finds-its-advocates.html?hp&action=click&pgtype=Homepage&module=photo-spot-region&ion=top-news&WT.nav=top-news&_r=1 (accessed October 9, 2015).

²⁰¹ In a different context, one study of landlord-tenant cases—another area where defendants tend to suffer from a lack of legal representation and advice—found that tenants who received informal legal advice but not formal legal representation achieved better results than average. Barbara L. Bezdek, "Silence in Court: Participation and Subordination of Poor Tenants' Voices in Legal Process," *Hofstra Law Review*, vol. 20, iss. 3, art. 2 (1992), <http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1742&context=hlr> (accessed January 11, 2016). New York Attorney Carolyn Coffey told Human Rights Watch that "even just offering a sample form answer with a list of check-off defense would go a long way." Human Rights Watch email correspondence with Carolyn Coffey, August 27, 2015.

²⁰² CLARO stands for Civil Legal Advice and Resource Office.

²⁰³ Bronx CLARO Program, "2014 Fourth Quarter and Annual Report," June 3, 2015, on file with Human Rights Watch.

²⁰⁴ Human Rights Watch visit to CLARO consultations, Bronx courthouse, NY, February 4, 2015.

program in collaboration with the Legal Aid and Defender Association (LADA). The court schedules all debt buyer cases on the same morning every week, and invites LADA attorneys to set up a table outside the courtroom to offer advice and in some cases representation to defendants.

“We just want to make sure there’s a level playing field and that everyone has a fair chance,” Judge Goedert told Human Rights Watch. “A lot of times people get good outcomes that they would not have been able to get if they were representing themselves.” The program has earned widespread praise from legal aid attorneys and consumer advocates, but nothing like it exists in most other Michigan district courts. “That’s what surprises me,” Judge Goedert said. “It mystifies me. I’d expect to see it everywhere but you don’t see it anywhere. It just seems like the obvious thing to do.”²⁰⁵

State court systems and legislatures should take action to ensure that initiatives like these take root in all courts with a significant docket of debt buyer and other consumer credit cases. State legislatures should not only encourage such initiatives, but fund them. One obvious source of revenue for this would be the court fees debt buyers and other litigious creditors pay each time they file a case. As one debt buyer representative put it to Human Rights Watch when pressed about the inequality of arms that characterizes cases pitting his company against unrepresented defendants, “We file a lot of cases, and we pay a lot of court fees. Why can’t they use some of that money to provide legal services to people?”²⁰⁶

Sharply Limit Interest Rates in Debt Buyer Cases

The policy rationale for allowing credit cards to carry extremely high rates of interest essentially boils down to the idea that doing so encourages lenders to extend credit to people who would otherwise be unable to obtain it. But this policy rationale does not translate into the context of purchased debt.

There is no compelling policy reason to allow debt buyers to continue to extract credit card rates of interest—often pegged at higher than 25 percent—after the debts are sold on to them. As Maryland attorney Peter Holland noted in an interview with Human Rights Watch, debt buyers “are investors seeking a return and they are using the court system to do that.

²⁰⁵ Human Rights Watch telephone interview with Judge Charles Goedert, 43rd District Court, Hazel Park, MI, April 29, 2014.

²⁰⁶ DBA Interview, April 29, 2015.

They are seeking to appreciate their investment, not recoup what they have given like an original creditor would.”²⁰⁷

Debt buyers would not be put out of business by legislation barring them from charging contract rates of interest on purchased credit card debt, if anything it would simply impact the prices they might be willing to pay for some portfolios of debt. In fact, debt buyer lobby group DBA International notes in its own promotional materials that, “In many situations, debt buyers, although legally able to do so, do not continue adding interest to the account. This freezing of interest eliminates the frustrating experience that happens when—even though the consumer is making payments—debt continues to grow.”²⁰⁸ As of October 2015, DBA was debating whether to adopt a policy barring its member companies from charging contract rates of interest on purchased credit card debt.

There may be nothing that state governments or courts can do to address this problem—though litigation on this point is pending before the federal courts—but the federal government certainly can.²⁰⁹ The US Congress should pass legislation mandating that consumer debts cease to accumulate interest if they are sold on to a third party debt buyer. State governments, for their part, should consider lowering or eliminating the rates of post-judgment interest that apply in consumer credit cases across the board.

²⁰⁷ Human Rights Watch interview with Peter Holland, Annapolis, MD, May 22, 2014.

²⁰⁸ DBA International, “The Role and Value of the Debt Buying Industry,” on file with Human Rights Watch.

²⁰⁹ The US Supreme Court made credit cards as we know them—widely available but carrying rates of interest that run afoul of most states’ usury laws—possible with its 1978 ruling in *Marquette National Bank of Minneapolis v. First of Omaha Service Corp* (439 U.S. 299 (1978)). In that case, the court interpreted federal law as permitting banks to export whatever rates of interest are permitted in the state where they had their headquarters to borrowers anywhere in the US, regardless of the usury laws prevailing in those borrowers’ home states. The ruling set off a “race to the bottom” with South Dakota and several other states essentially obliterating their own usury laws in order to attract banks to move their headquarters there. See Pat Curry, “How a Supreme Court ruling killed off usury laws for credit card rates,” *CreditCards.com*, November 12, 2010, <http://www.creditcards.com/credit-card-news/marquette-interest-rate-usury-laws-credit-cards-1282.php> (accessed October 9, 2015). In 2015 in *Madden v. Midland Funding*, however, the Second Circuit held that state usury laws are not necessarily inapplicable to debts after banks sell them on to debt buyers. A request by Midland Funding for an en banc hearing was denied in August 2015. *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015); Order Denying Rehearing, No. 14-2131-cv, ECF No. 140 (2d Cir. Aug. 12, 2015).

The Human Rights Responsibilities of Courts, State Governments, and Debt Buyers

The practices of the debt buying industry documented in this report and in particular the reality of debt buyer litigation in court rooms across the country implicate a range of human rights norms, including specific treaty obligations binding on the US government.

As a party to the International Covenant on Civil and Political Rights (ICCPR), US legal obligations include ensuring that “[a]ll persons shall be equal before the courts and tribunals. In the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law.”²¹⁰ The Committee on Civil and Political Rights, which interprets and oversees compliance with the ICCPR, has noted that, “The right to equality before courts and tribunals also ensures equality of arms.”²¹¹

The principle of “equality of arms” is inherent in the concept of a fair hearing, meaning a need for a “fair balance” between the parties, and applies to civil as well as to criminal cases.²¹² In this regard, a fair balance between the parties requires that each party be afforded a reasonable opportunity to present their case— including contesting the arguments and the evidence—under conditions that do not place them at a substantial disadvantage vis-à-vis the other party. Sometimes this requires that free legal advice or representation be available to a party not otherwise able to afford it.

The responsibility to ensure equality of arms and fairness of hearings lies with legislatures to ensure that under the law both parties enjoy the same procedural rights and any distinction is justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. However it also lies with the “competent, independent, and impartial” courts and tribunals to ensure that what plays

²¹⁰ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A XXI, 21 U.N. GOAR Supp. (NO. 16) at 59, U.N. Doc. A/ 6316 (1966), 999 U.N.T.S 302, entered into force March 23, 1976, article 14, para. 1.

²¹¹ UN Human Rights Committee, General Comment No. 32: Article 14, Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (2007), para. 13.

²¹² Ibid.

out in the proceedings before them is a fair hearing in which the interests of both parties are safeguarded and that one party is not at a disadvantage.

The US has signed but not ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and so while not fully bound by the covenant, under international law is required to refrain from acts which would defeat the object and purpose of it.²¹³ The ICESCR builds on the guarantee provided in the Universal Declaration of Human Rights (UDHR) that everyone is entitled to realization of the economic and social rights indispensable for dignity and has a right to a “standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care.”²¹⁴

While neither debt buying nor debt buying litigation are incompatible with the realization of economic and social rights, the evidence demonstrates that unchecked or abusive practices in this sector, and through the court system, have direct and detrimental consequences for the ability of many alleged debtors to secure basic economic and social needs for themselves or their families such as food, clothing, and health care. In fulfilling the obligation to protect and promote human rights, governments should intervene to prevent and at a minimum mitigate practices that have such impacts, and in particular be vigilant to ensure that they are not complicit in such practices through actions of state institutions such as the courts.

Both covenants as well as the UDHR guarantee that enjoyment of the rights is to be “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”²¹⁵ Available evidence and experience clearly points to the impact of the problematic practices in this report falling disproportionately on poor and on minority communities. So while existing laws and practices governing debt collection may appear neutral at face value, in practice

²¹³ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976. See also Vienna Convention on the Law of Treaties, art. 18, adopted May 23, 1969, United Nations, Treaty Series, vol. 1155, p. 331.

²¹⁴ Universal Declaration of Human Rights (UDHR), adopted December 10, 1948,

G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), arts. 22 and 25. See also arts. 11 and 12 of the ICESCR.

²¹⁵ See art. 2 of each instrument.

and in particular when they are implemented in the manner of much debt buyer litigation documented here, they have a disproportionate impact on the ability of clearly identifiable communities to secure their human rights. To the extent that this disproportionate impact intersects with prohibited grounds of discrimination such as race, social origin, or status, it constitutes indirect discrimination. The state should take care to identify and address practices that constitute indirect discrimination, recognizing that they can not only hinder poverty alleviation, but exacerbate poverty.

Consumer Protections under US Federal Law

In 1977 Congress passed the Fair Debt Collection Practices Act (FDCPA) to “eliminate abusive debt collection practices by debt collectors.”²¹⁶ The FDCPA remains the cornerstone of the US legal framework protecting debtors and alleged debtors against abusive collections practices. It has heavily influenced the policies and practices of the debt collection industry, including debt buyers, and the way these firms interact with consumers.²¹⁷ Until 2011 the FDCPA was administered and enforced by the Federal Trade Commission. In July 2011 that mandate was transferred to the newly created Consumer Financial Protection Bureau (CFPB).²¹⁸ In recent years the CFPB has shown considerable interest in regulating debt collectors, and debt buyers in particular, more robustly pursuant to the FDCPA. The agency is expected to promulgate new rules to that effect in 2016.²¹⁹

The FDCPA is wholly focused on the practices of debt collectors themselves. What the FDCPA does not do is dictate how state court systems should safeguard the rights of consumers sued by debt buyers and other debt collectors. Instead, this responsibility lies squarely with state legislatures and court systems. To date—and with a few positive exceptions described below—most have largely failed to take action on this front.

²¹⁶ FDCPA sec 802(e), 15 USC sec 1692(e) (2006).

²¹⁷ The FDCPA does not govern the conduct of original creditors. Some debt buyers had argued that they should be considered creditors rather than “debt collectors” since they own the debts they seek to collect, and therefore be considered exempt from the terms of the FDCPA. US courts have so far universally rejected these arguments. See *Kimber v. Federal Financial Corp*, 668 F. Supp. 1480 (M.D. Ala 1987); *McKinney v. Cadleway Props, Inc.* 548 f.3d 496, 501 (7th Cir 2008); *FTC v. Check Investors, Inc.* 502 F.3d 159 (3rd Cir 2007).

²¹⁸ Dodd Frank sec 1089; FDCPA sec 814; 15 USC 1962.

²¹⁹ Human Rights Watch telephone interview with CFPB official (name withheld), October 16, 2015.

Court Integrity and the Rights of Disadvantaged Litigants

The theory behind a default judgment is essentially that when a defendant fails to respond to or otherwise defend against a lawsuit, the court may deem them as having admitted all of the allegations against them and enter judgment in favor of the plaintiff. This does not mean, however, that courts are or should be obliged to rubber stamp plaintiffs' claims simply because the defendant has failed to mount a defense. As New York Chief Judge Jonathan Lippman put it in an interview with Human Rights Watch:

Our job is not to facilitate debt buyers or anyone else in getting judgments. Our job is to ensure that every judgment has real gravitas and ensure the integrity of the court process.... That is our role—not just to count the cases that come in but to make sure there is fair and equal justice for everybody and make sure there is a level playing field.²²⁰

Courts have a legitimate interest in protecting their own integrity and in protecting the rights of vulnerable litigants whose rights are at issue in the claims before them. In some cases this may lead courts to apply greater scrutiny to cases that seem headed for default judgments than they might in other contexts.

In the context of debt buyer litigation this report has described numerous factors that should give courts pause before handing down default judgments that are not supported by some reliable indicia of merit: notably the widespread ability of debt buyer plaintiffs to obtain default judgments later revealed to be unlawful or without merit, concerns about the quality of information and evidence plaintiffs actually present, the tangible impact these lawsuits can have on the ability of poor families to meet basic needs, and the inability of many defendants to access competent legal representation or advice.²²¹ This combination of equities and concerns combine to give courts ample reason to apply greater scrutiny to debt buyer cases than they might to other cases that seem headed for default judgments. And as noted above, a few states have already shown that this can be

²²⁰ Human Rights Watch interview with Chief Judge Jonathan Lippman, New York City, November 13, 2014.

²²¹ See above, Rubber Stamp Justice: Default Judgments without Evidence or Scrutiny.

done in a way that is practical, fair, and largely acceptable to the debt buying industry itself.²²²

Courts have an obligation to ensure that unrepresented defendants in debt buyer cases are able to secure a hearing if they want one. The current practice of many courts that pressure unrepresented defendants into unsupervised negotiations with debt buyer attorneys is at odds with this imperative. There is nothing wrong with the court encouraging or facilitating dialogue between the parties to a civil dispute, or encouraging efforts to settle disputes out of court. But the current practice of many courts is to create something more akin to a kind of gauntlet defendants must run in order to obtain a hearing that they are in fact entitled to as a matter of right.²²³ Given the profound inequality of arms between the parties in most debt buyer lawsuits, courts should take care to ensure that any negotiations encouraged or facilitated by the court are supervised, and that defendants have access to independent legal advice or representation.

Finally, courts and state governments should take proactive steps to mitigate the profound imbalance of power between attorneys for debt buyers and pro se defendants in most debt buyer cases. The Committee on Civil and Political Rights has noted that “[t]he availability or absence of legal assistance often determines whether a person can access the relevant proceedings or participate in them in a meaningful way.” While the legal right to legal assistance is primarily relevant in criminal cases, “states are encouraged to provide free legal aid in other cases.”²²⁴ As discussed above, some courts have had success balancing the scales between debt buyer plaintiffs and defendants simply by facilitating access to free, competent legal advice to unrepresented defendants.

The Human Rights Responsibilities of Debt Buying Firms

While the primary responsibility to safeguard human rights lies with governments, businesses also have important human rights responsibilities. The UN Guiding Principles on Business and Human Rights articulate the notion that businesses have a responsibility to respect human rights, to take effective steps to avoid causing or contributing to serious

²²² See above, No More Rubber Stamp Default Judgments.

²²³ See above, Thrown to the Wolves: Unrepresented Defendants in Court.

²²⁴ UN Human Rights Committee, General Comment No. 32: Article 14, Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (2007), para 10.

human rights abuses, and to take effective steps to remedy any abuses that occur in spite of these efforts.²²⁵

In line with these principles, debt buying companies should take steps to ensure that any and all lawsuits filed against consumers are rooted in valid, enforceable claims and supported by reliable evidence and information. Debt buyers should also take care to put adequate controls in place over the conduct of the attorneys they retain to ensure that all defendants receive adequate notice of the suits against them and guarantee that they conform to all applicable statutes of limitations and other legal norms. The recommendations outlined in the previous section of this report represent the obvious first steps towards meeting these obligations.

This report also calls on debt buying firms to refrain from continuing to accumulate contract rates of interest on purchased debts. Recognizing that the companies are under no legal compulsion to do so, we nevertheless advocate this step because the current practice has such a deleterious impact on the ability of many alleged debtors to realize basic economic and social rights, and there is no countervailing policy justification for allowing debt buyers to charge high rates of interest on purchased debts.²²⁶

²²⁵ “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,” Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, U.N. Doc. A/HRC/17/31, Annex, I.A.1, March 2011, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed January 13, 2016).

²²⁶ See above, Runaway Interest and Costs.

Recommendations

To State Governments

- Pass legislation that requires debt buyers and other creditors to provide meaningful evidence in support of their legal claims when filing a debt collection lawsuit. Consider modeling this on the court rules introduced in New York in 2014.
- Ensure that courts have the staff and other resources they need to apply meaningful and proactive scrutiny to the claims at issue in all debt collection lawsuits and requests for post-judgment remedy, and the evidence in support of them. Pass legislation that empowers and requires courts to apply meaningful and proactive scrutiny before issuing a default judgment in these cases.
- Pass legislation to sustainably fund programs that provide independent legal advice or representation to low-income defendants in debt collection cases. For example, governments could allocate some of the filing fees paid by plaintiffs in debt collection lawsuits to these purposes.
- Consider lowering statutorily mandated rates of post-judgment interest to a rate indexed to inflation.
- Undertake broader overhauls of the legal framework governing debt collection and debt collection litigation to ensure adequate protection of defendants' rights.

To All State Court Systems

- To the extent permitted by existing state law, adopt rules requiring debt buyers and other creditors to provide meaningful evidence in support of their legal claims.
- To the extent permitted by existing state law, adopt rules empowering and requiring courts to apply meaningful and proactive scrutiny to the claims at issue in all debt collection lawsuits and requests for post-judgment remedy, and the evidence in support of them, before issuing a default judgment or acceding to a plaintiff's request for garnishment or other post-judgment remedy.
- Adopt rules barring judges from encouraging or ordering defendants in debt buyer cases to engage in informal negotiations with plaintiffs' attorneys unless under the active supervision of a judge, a neutral mediator, or other designated officer of the court.

- Adopt rules providing that to supplement notice provided directly by plaintiffs, courts will independently mail notice of debt buyer and other debt collection lawsuits to the defendants using information provided by plaintiffs. Require that all notice, including that provided by plaintiffs, should include information about where defendants can turn for legal assistance or independent legal advice.
- Adopt rules empowering and requiring judges to adopt a proactive role in hearings involving pro se litigants in consumer credit cases. Judges should apply substantive scrutiny to the plaintiffs' allegations and guide unrepresented defendants toward legally relevant facts.

To Individual Courts Adjudicating Debt Buyer Cases

- To the extent permitted by existing state law and applicable court rules, require debt buyers and other creditors to provide meaningful evidence in support of their claims at the time of filing, including but not limited to the information required under the New York rules.
- To the extent permitted by existing state law and applicable court rules, apply meaningful scrutiny to all uncontested claims and requests for post-judgment remedy, as well as the evidence in support of them, in debt buyer and other debt collection cases.
- To the extent permitted by existing state law and applicable court rules, refrain from encouraging or ordering defendants in debt buyer cases to engage in informal negotiations with plaintiffs' attorneys unless under the active supervision of a judge or other designated officer of the court

To the US Federal Government

- Pass legislation mandating that consumer debts will no longer continue to accumulate interest at rates in excess of those set down in state usury laws after being sold on to a third party.
- Amend existing law to significantly lower the maximum percentage of a debtor's income that creditors can garnish, and to preclude wage garnishment altogether unless a debtor's income puts them above the poverty line.
- Pass legislation that prohibits creditors from garnishing a debtor's bank account below a prescribed minimum balance adequate to secure access to basic needs.

To Debt Buying Companies

- Refrain from adding interest to, and from collecting post-judgment interest on, the balance of purchased debts.
- Bar all attorneys litigating plaintiffs' claims from engaging in direct negotiations with unrepresented defendants on court premises unless these take place in the presence of judges, neutral mediators, or other designated officers of the court.
- Refrain from purchasing any debt or portfolio of debt unless the seller is willing to provide all of the warranties enumerated in the DBA International certification standard.
- In all communication with alleged debtors, clearly indicate the provenance of the debt at issue and the date on which it was purchased.

To DBA International

- Amend DBA's Certification Program to require member companies to adopt policies that operationalize the recommendations to debt buying companies outlined above. Incorporate these new membership requirements into DBA's certification standard.
- Adopt a policy prohibiting member companies from accumulating pre- or post-judgment interest on purchased debts.

To Banks and other Creditors

- As a matter of policy, provide all of the warranties described in the DBA International certification standard when selling debts on to a third party debt-buyer.
- Provide written notice to any borrower whose debt is sold on to a third party debt buyer that indicates the date of the sale, the name and contact details of the purchaser, and an account statement indicating the balance that allegedly remained on the account at the time of sale.

Acknowledgments

This report was researched and written by Chris Albin-Lackey, Senior Legal Advisor at Human Rights Watch.

It was reviewed and edited by Arvind Ganesan, business and human rights director; Antonio Ginatta, US Program advocacy director; Aisling Reidy, senior legal advisor; and Babatunde Olugboji, deputy program director. Additional editorial and production assistance and research support was provided by Darcy Milburn, business and human rights senior coordinator. Brian Root, quantitative analyst, helped obtain, analyze, and develop graphic representation of data on cases filed by debt buyers in several courts and state court systems. Charts for the publication were prepared by Grace Choi, publications director; Brian Root; and Darcy Milburn. The report was prepared for publication by Olivia Hunter, Publications/Photography Associate; and Fitzroy Hepkins, administrative manager.

Human Rights Watch offers its gratitude to the individuals and organizations that helped facilitate this research, including those who have generously supported our work on business and human rights. Human Rights Watch would particularly like to thank all of the individuals who agreed to be interviewed for this report. We would like to extend particular thanks to Jonathan Lippman, chief judge of the New York State courts and Steven McMurray, justice of the peace in Maricopa County, Arizona, for facilitating the provision of empirical data about debt buyer caseloads to Human Rights Watch; Jan Stieger of DBA International; Maryland attorney Peter Holland, for invaluable initial guidance in the framing of this research; Carolyn Coffey of MFY legal services in New York, for providing substantial feedback on Human Rights Watch's initial findings as well as helping to coordinate interviews with other practitioners as well as alleged debtors; and Dora Galacatos of Fordham Law School and Bronx CLARO, for facilitating conversations with alleged debtors seeking advice from CLARO volunteers in New York City's Bronx courthouse.

RUBBER STAMP JUSTICE

US Courts, Debt Buying Corporations, and the Poor

Courts in jurisdictions across the United States have failed to protect the rights of poor people sued by multibillion dollar debt-buying corporations. Debt buyers—firms that buy up delinquent consumer debt for pennies on the dollar and then try to collect the full face value plus interest through a variety of means including litigation—file hundreds of thousands of lawsuits against US consumers every year.

Rubber Stamp Justice details the response of courts in such cases, and their failure to effectively confront frequent instances of error, legal deficiency, defective service and other problems. Many of the people debt-buying companies sue are poor and do not know their rights, and almost none have lawyers. Yet many courts have done little or nothing to ensure that the lawsuits have factual or legal merit, or to correct the profound imbalances of power facing mainly unrepresented defendants. Some have in fact erected formidable barriers to defendants who simply want a meaningful day in court in front of a judge.

The report is based on interviews with people sued by debt buyers, debt-buyer industry representatives, judges, attorneys, and other key stakeholders, as well as empirical data on caseloads obtained by Human Rights Watch. It argues that by handing out judgments to debt-buying companies without sufficient and proper evidence or scrutiny, courts have put the rights of poor defendants as well as their own basic integrity at risk. It concludes with pragmatic recommendations that courts, state legislatures, and the US federal government should take to address the injustice.



© 2016 Brian Stauffer for Human Rights Watch